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RECORD, CASE No. 13,824.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 221.

HENRY H. PORTER AND RANSOM R. CABLE, APPELLANTS,

vs.

DWIGHT M. SABIN, JOSEPH C. O'GORMAN, THE NORTHWESTERN MANUFACTURING AND CAR COMPANY, AND THE MINNESOTA THRESHER MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 18, 1889.

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1 United States Circuit Court, District of Minnesota.

Pleas before the honorable the judges of the United States circuit court of America for the district of Minnesota, of the June term of said court, held in the city of St. Paul, in said district, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the 113th year.

HENRY H. PORTER and RANSOM R. CABLE, Complainants, *vs.* DWIGHT M. SABIN and JOSEPH C. O'GORMAN, Defendants. } In Chancery.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 9th day of September, 1887, came the complainants above named, by Clapp and Macartney, solicitors and of counsel, and filed in the clerk's office of said court their bill in equity; which said bill is in the words and figures following, to wit:

Bill in Equity.

2 In the Circuit Court of the United States for the District of Minnesota.

To the judges of the circuit court of the United States for the district of Minnesota, in chancery sitting:

Henry H. Porter and Ransom R. Cable, who are citizens of the State of Illinois and stockholders of the Northwestern Manufacturing and Car Company, which is a corporation organized under the laws of the State of Minnesota and a citizen of said State, on their own behalf and on behalf of all other stockholders of the said Northwestern Manufacturing and Car Company, bring this bill of complaint against Dwight M. Sabin, the former president, and Joseph C. O'Gorman, the former auditor and treasurer, of said Northwestern Manufacturing and Car Company, both of whom are citizens of the State of Minnesota; and thereupon youroratorscomplain and say that Henry H. Porter, one of the complainants herein, is the legal owner and holder of two thousand shares of the preferred stock of said Northwestern Manufacturing and Car Company, of the face value of fifty dollars each, amounting in the aggregate to one hundred thousand dollars, and of one thousand shares at fifty dollars each of the common stock of said corporation, amounting at the face thereof to fifty thousand dollars; that said certificates bear date on the 10th day of May, 1882, and were received by him on or about the 20th day of June, 1882, and that the complainant Ransom R. Cable is the legal owner and holder of five hundred shares of fifty dollars each of the preferred stock of said corporation, amounting in the aggregate to twenty-five thousand dollars, and 250 shares at $50

each of the common stock of said corporation, amounting to $12,500, which certificates of preferred stock bear date on the 28th day of December, 1882, and of the common stock on the 29th day of Dec., 1882, at or about which time the same were delivered to the said Cable.

And your orators further show that the said Northwestern Manufacturing and Car Company was a corporation organized on the 25th day of April, A. D. 1882, pursuant to and in conformity
3 with an act of the legislature of the State of Minnesota entitled "An act relating to manufacturing corporations," approved March 7th, 1873, and the several acts of said legislature amendatory thereof; that the object- for which said corporation was formed are stated in the articles of association to have been the manufacture, building, and sale of steam-engines of all kinds, and the manufacture, building, and sale of passenger cars, freight cars, flat cars, cattle cars, and all other kinds of cars and fixtures and attachments thereto belonging, and the manufacture and sale of farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements, and machinery in which wood and iron form the principal component parts, and the manufacture of the materials therein used. The capital stock of said corporation was placed at five millions of dollars, divided into one hundred thousand shares of $50.00 each. It was further stated in said articles of association that the corporation should commence on the 10th day of May, A. D. 1882, and should continue in existence for a term of thirty years, and that the principal place of business should be in the city of Stillwater, in the county of Washington, in the State of Minnesota; that on the 12th day of May, 1882, a certificate of the objects for which the said company was formed, the amount of its capital stock, the amount actually paid in, and number of shares by each respectively owned, signed by its president and a majority of its directors, was filed in the office of the secretary of state for the State of Minnesota, and on the 13th day of May, 1882, a like certificate was for the first time filed in the office of the register of deeds for said county; that the first meeting of the corporators for the purpose of completing the organization of said company was held on the 10th day of May, 1882, at which meeting a resolution was passed classifying the stock of said corporation into preferred and common stock and fixing the amount of the former at three millions of dollars, or sixty thousand shares at $50.00 each, and the former at two millions of dollars, or forty thousand shares at $50.00
4 each, and providing that the preferred stock should draw a dividend of eight per cent. per annum, to be due and payable in quarterly or semi-annual installments, as the directors might determine, commencing January 1st, 1883, and which should be declared and paid from the net earnings of the company prior to any dividend on the common stock. The following forms of certificates were also adopted at said meeting, to wit:

Preferred Stock Certificate.

Northwestern Manufacturing and Car Company.

Capital, $5,000,000; $3,000,000 preferred stock, $2,000,000 common stock, divided into shares, $50.00 each.

CITY OF STILLWATER, }
State of Minnesota. }

This certifies that —— —— is entitled to — shares of fifty dollars each of the preferred capital stock of the Northwestern Manufacturing and Car Company, transferable only in person or by attorney on the books of the company upon the surrender of this certificate.

This stock is entitled to a preferred dividend prior to the common or any other stock of the company of eight per cent. per annum, which shall be payable out of the next earnings of the company in quarterly or semi-annual installments, as the directors may determine, commencing with January 1st, 1883, and in case of a voluntary or other dissolution of the company this stock shall, to the extent of its par value, be first paid out of the assets of the company before any payments shall be made upon the common or any other stock.

The books of transfer shall be closed for fifteen days prior to and on dividend days, and all dividends shall be payable to stockholders of record on the books of the company.

Each share of this stock entitles the owner of record on the books of the company to a vote in all meetings of the stockholders.

This certificate will not become valid until countersigned and registered by the registrar of transfers of the company.

In witness whereof there is hereto affixed the corporate seal of the said Northwestern Manufacturing and Car Company and the
5 hands of its president and secretary, at the city of Stillwater, in the State of Minnesota, this — day of ——, 188–.

—— —— *President.*

—— ——, *Secretary.*

Common Stock Certificate.

Northwestern Manufacturing and Car Company.

Capital, $5,000,000; $3,000,000 preferred stock, $2,000,000 common stock, divided into shares of $50.00 each.

CITY OF STILLWATER, }
State of Minnesota. }

This certifies that —— —— — entitled to — shares of fifty dollars each of the common capital stock of the Northwestern Manufacturing and Car Company, transferable only in person or by attorney on the books of the company upon the surrender of this certificate.

This stock is entitled to such dividends as the directors may determine to pay in cash or scrip from the net earnings of the company after paying the dividends on the preferred stock.

The books of transfer shall be closed for fifteen days prior to and on dividend days, and all dividends shall be payable to stockholders of record on the books of the company. Each share of this stock entitles the owner of record on the books of the company to a vote in all meetings of the stockholders.

This certificate shall not become valid until countersigned and registered by the registrar of transfers of the company.

In witness whereof there is hereunto affixed the corporate seal of the said Northwestern Manufacturing and Car Company and the hands of its president and secretary, at the city of Stillwater, in the State of Minnesota, this — day of ——, 188–.

—— ——, *President.*

—— ——, *Secretary.*

At the same meeting of the stockholders held on said 10th day of May, 1882, and at a directors' meeting held on the same day resolutions were adopted authorizing the purchase by the corporation, through one H. W. Cannon, who appears to have been an agent or trustee appointed for that purpose, of the assets,
6 business, good will, &c., of the corporation known as Seymour, Sabin & Co. to the extent of $4,117,000.00, to be paid for in the stock of said Northwestern Manufacturing and Car Company at the face thereof, in the proportion of $2,617,000.00 of preferred stock and $1,500,000.00 of the common stock of said company, on the condition that when the transfer of said property was fully completed the said property so transferred should be free and clear from all claims, liens, and demands, legal or equitable, of said Seymour, Sabin & Co., its stockholders, creditors, or other persons.

At a meeting of the directors of said Northwestern Manufacturing and Car Company held on the 11th day of May, 1882, a report was made by a committee representing said corporation that the assets of said Seymour, Sabin & Co. to the amount and value of $4,117,000.00 had been duly transferred and delivered to said corporation, and that 30,000 shares, amounting to $1,500,000.00, of the full-paid preferred stock of the car company and 15,000 shares, amounting to $750,000.00, of the full-paid common stock of the corporation had been paid on account of said purchase, and that the committee still retained in its hands, to be held by it until all the debts of Seymour, Sabin & Co. were fully paid and all liens on said property so transferred discharged, $1,117,000.00 of the full-paid preferred stock of the corporation. On the same day a bill of sale and conveyance was made by said Seymour, Sabin & Co. to the said Northwestern Manufacturing and Car Company transferring to said car company, for the consideration hereinbefore mentioned, the good will of said Seymour, Sabin & Co. as a manufacturing corporation, together with the assets, both real and personal, therein described, covenanting that said Seymour, Sabin & Co. had an absolute and indefeasible title to all and singular the property therein specified,

and that all the rights, interests, property, and estate thereinbefore specified and transferred were free and clear of all incumbrances, claims, or liens whatever.

Your orators further show that after the purchase of the assets aforesaid and the payment therefor in the preferred and
7 common stock of said corporation there remained undisposed of $383,000.00 of the preferred stock of said Northwestern Manufacturing and Car Company and $500,000.00 of the common stock thereof; that said preferred stock was subsequently disposed of and the money realized thereon to the extent of $383,000 00 and pai l into the treasury of said corporation, and that it appears from the books of said corporation that from and after the 4th day of September, 1882, there was outstanding and in the hands of stockholders scattered throughout the country three millions of dollars of the preferred stock of said corporation and one million five hundred thousand dollars of the common stock thereof; and it further appears from the books of account of said corporation that there was in possession of its officers money and assets at that time to the amount and apparent value of four millions five hundred thousand dollars.

Your orators further allege upon information and belief that of the assets so purchased of Seymour, Sabin & Co. about $1,500,000 thereof, which was supposed to be the basis for the common stock issued in payment of the same, had but very little, if any, value and consisted largely of deductions previously made from the value of the tangible assets w-ich formed the basis of the preferred capital stock, and of book accounts which constituted a liability instead of an asset, and of certain alleged contracts, patents, licenses, &c., of very slight value, and that of the tangible and equitable assets so purchased and paid for in the preferred stock of said corporation at least $600,000.00 of the most available portion thereof were not in fact delivered to the car company at the time of said purchase, and a considerable portion of the same was never delivered at any time, which facts were not known to either of your orators until after the failure of the car company hereinafter set forth.

Your orators further show that on the 10th day of May, 1882, at the first meeting of the stockholders of said corporation, the defendant Joseph C. O'Gorman was elected the auditor of said corporation, and it thereupon became his duty as such auditor, under the by-laws adopted at such meeting, to keep the books and take charge of
8 and safely keep all evidences of debt belonging to the corporation, and to collect and disburse all moneys belonging to the corporation, and when requested by the board of directors to make a statement showing the financial condition of the corporation; that said O'Gorman continued to hold said position as auditor until the 21st day of September, 1883, at which time he was elected treasurer of said corporation and continued to act as such until the failure of said corporation. At the same meeting C. D. Gilfillan was elected the president of said corporation, and continued to act as such until about the 25th day of June, 1882; that at a meeting of the board of directors of said corporation held on the 9th day of June, 1882, the

defendant D. M. Sabin was elected a director thereof to fill the vacancy in the board caused by the resignation of one of its members, and on the same day the resignation of C. D. Gilfillan as president was presented, to take effect June 25th, 1882, and the defendant Sabin was elected president of said corporation, to enter upon the duties of his office upon the creation of a vacancy therein by the resignation of said Gilfillan, and that thereafter and at the time stated the said Sabin accepted the position of president of said corporation and entered upon the discharge of his duties and continued as such president during the whole period of the corporate existence of said company, and that under the by-laws adopted by the board of directors thereof the president had general supervision and direction of the affairs and business of the corporation, subject to the order of the board of directors, and was required to preside at all meetings of the stockholders and of the board of directors, and, unless otherwise specially ordered, was required to sign all certificates of stock, contracts, and legal papers to which the corporation was a party, except as provided in article number 15 of said by-laws. Article number 15 aforesaid relates to the signing of papers of value and is as follows:

9 "All promissory notes, checks, drafts, bills of exchange, and all commercial paper of this corporation shall be signed by either the president, vice-president, secretary, assistant secretary, or treasurer, and countersigned by the auditor, or in case he is unable to act by one of the officers above named, but in no case shall the same officer sign and countersign the same paper. Any checks, drafts, or bills of exchange which may be deposited to the credit of this corporation in any bank may be endorsed payable to said bank for the credit of the corporation, and all promissory notes, bills of exchange, or acceptances of others discounted or sold by this corporation may be endorsed for such purpose, and all drafts upon this corporation for merchandise or material purchased or for sums that may be due from this corporation to others may be accepted or endorsed as the case may be by any one of the officers of this corporation. All orders or contracts for the purchase of merchandise or material for use in the manufacturing or other business of this corporation shall be signed by the purchasing agent of the corporation or by any one of its officers and countersigned by either of its officers, provided that in no case shall the same officer both sign and countersign the same paper, and provided, however, that orders or contracts for $2,000.00 or less may be signed by the purchasing agent or any officer of the corporation and shall not require countersigning, provided that purchases amounting to over $10,000.00 shall require the approval of both the president and secretary, and purchases exceeding in amount the sum of $25,000.00 shall require the approval of the executive committee."

At said directors' meeting last mentioned a resolution was passed authorizing the payment or assumption of $250,000.00 of the special preferred stock of Seymour, Sabin & Co., according to its terms, of the par value thereof and accrued interest, upon condition that said Cannon, who, as the agent or trustee of Seymour, Sabin & Co., had

subscribed for the capital stock of said corporation, would surrender or release his subscription to the extent of $250,000.00;
10 that thereafter and in pursuance of said resolution the car company did enter into a contract to assume said liability upon said special preferred stock for the consideration mentioned in said resolution, but your orators allege upon information and belief that the preferred stock of the car company to the extent of $250,000.00, which was to be surrendered in consideration of such assumption of the special preferred stock of Seymour, Sabin & Co., was never in fact surrendered or released, but that the same was delivered to Seymour, Sabin & Co. or to some one to hold in trust for them, and was subsequently sold and the proceeds realized by said last-named corporation.

Your orators further show that at the time of the organization of the car company or shortly thereafter it had assets in its possession or to which it was entitled of the fair cash value, including the subsequent payment of moneys for stock by outside parties, of about three millions of dollars, and substantially no indebtedness; that from the time of the election of said defendant Sabin as president of said corporation and during the whole period subsequent of its corporate existence the said Sabin and the said O'Gorman had practically in their control all the business affairs and finances of said corporation, and it became and was their duty to manage its affairs and conduct its business for the sole benefit of said corporation and its stockholders.

Your orators further show that at the time of the sale by the corporation known as Seymour, Sabin & Co. to the Northwestern Manufacturing and Car Company of its manufacturing business, assets, and good will it was represented by D. M. Sabin to the committee representing the car company that the liabilities of said corporation, including its alleged liability upon the $250,000.00 of special preferred stock, did not exceed the sum of $1,080,000.00, whereas in truth and in fact such liability amounted to over two millions, if it did not reach nearly three millions of dollars; that upon the completion of the purchase and the transfer of said
11 assets and the delivery of the stock, common and preferred, of the car company in payment thereof, the stockholders of Seymour, Sabin & Co. immediately absorbed and divided up among themselves $1,500,000.00 of the preferred stock and $750,000.00 of the common stock, leaving as assets for the payment of their debts $1,117,000.00 of the preferred stock of the car company and $750,000 of common, and but very little else, which assets were wholly insufficient for that purpose.

Your orators further show that between the 10th day of May, 1882, and the 8th day of August following the corporation of Seymour, Sabin & Co., in order to meet its maturing obligations, was compelled to and did negotiate its own paper and that of third parties endorsed by it to the extent of $1,815,656.54. During this same period of time the bills receivable used and discounted by the car company amount to but $28,700.85. As early as the 28th day of June, 1882, the defendants, Dwight M. Sabin, acting as the presi-

dent of the corporation, and Joseph C. O'Gorman, as its auditor, commenced to issue the paper of the car company for the accommodation of Seymour, Sabin & Co., and also at or about that time or shortly thereafter they commenced to use the credit of the car company for the benefit of Seymour, Sabin & Co. as endorsers upon various classes of accommodation paper issued for the benefit of said corporation of Seymour, Sabin & Co. The first issue of this class of accom-odation paper bears date as early as the 15th of July, 1882, and is made payable to the car company, and in some instances charged to the account of Seymour, Sabin & Co., and in others delivered to them and negotiated by them without being charged at all. Prior to the 14th day of August, 1882, there had been delivered to Seymour, Sabin & Co. paper executed by the car company as maker to the amount of $355,000.00, of which $205,000.00 had been negotiated and only $50,000.00 charged to it. Of accom-odation bills receivable, being paper made by third parties for the accom-odation of Seymour, Sabin & Co. and guaranteed or
12 endorsed by the car company, there was issued and delivered to Seymour, Sabin & Co. and charged to them upon the books of said company between the time of the organization of the car company and the 1st day of January, 1883, $580,000.00 in amount and of the same class of paper, being described as paper to the order of the Northwestern Manufacturing and Car Company or accepted by them, but which did not go into the Northwestern Manufacturing and Car Company's bills receivable or payable, but was paid by the makers of the paper or by Seymour, Sabin & Co., either through them direct or through the car company, in which latter case it was charged to Seymour, Sabin & Co. between the 20th day of October, 1882, and the 30th of July, 1883, $1,662,405.84 in amount, of which there had been paid on or before that date $622,095.59, leaving outstanding paper with the car company endorsement thereon on the 30th of July, 1883, $1,001,310.25, which transactions at the time did not appear in any manner upon the general books of account of the said corporation. Between the 5th of July, 1882, and the 30th day of July, 1883, the car company issued its own paper, payable to the order of D. M. Sabin, trustee, or Seymour, Sabin & Co., to the amount of $1,766,934.76, of which there was paid on or before July 30th, 1883, or not negotiated $1,157,541.98, leaving outstanding $609,392.78 of the car company paper delivered to and negotiated by Seymour, Sabin & Co., of which the general books of account of the car company contained at that time no record. These unauthorized transactions between the Northwestern Manufacturing and Car Company and Seymour, Sabin & Co., consisting chiefly of the use of the credit, money, and assets of the corporation, mainly money and paper, amount in the aggregate during the two years of the corporate existence of the car company to ower twelve millions of dollars, and at the time of the failure of the car company on the 10th of May, 1884, there appears from the books of the car company a balance due from Seymour, Sabin & Co., growing out of the transactions aforesaid, of $1,539,-176.03; which amount was subsequently reduced by sundry entries

upon said account (whether properly allowed or correctly
13 made or not your orators are not advised) to the sum of $1,042,598.71, which amount now stands as a direct liability from Seymour, Sabin & Co. to the Northwestern Manufacturing and Car Company, arising out of the transactions had between the two corporations in the shape of accommodations by the car company to Seymour, Sabin & Co. during the period aforesaid, and which claim is nearly, if not quite, worthless, and the amount thereof a total loss to the car company.

And your orators further show that all of the transactions hereinbefore referred to and consisting of the loan of its corporate name as well as advances of money and otherwise for the accom-odation of third parties and particularly of the corporation of Seymour, Sabin & Co. were intentionally and deliberately concealed from the great majority of the directors of the corporation and of its stockholders and creditors, and that for the purpose of concealing the same no proper and accurate account was kept at the time of the occurrence of said transactions upon the books of the company. Large numbers of notes were issued from time to time and delivered to Seymour, Sabin & Co. or negotiated by them and the proceeds received by them and in many instances credited to their account months before they were charged with the paper upon which the money was raised. The effect of this system of book-keeping was to show for a long time after the organization of the car company a credit balance in favor of Seymour, Sabin & Co. when at all times they were in fact largely the debtors of the car company, and so it would have appeared had the books been honestly and properly kept. It was not until after the failure of the two corporations that a proper adjustment was made of the account and the proper charges made against Seymour, Sabin & Co. and the correct balance due from Seymour, Sabin & Co. to the car company substantially ascertained. As late as the 30th day of April, 1884, eleven days before the failure, the account of Seymour, Sabin & Co. upon the books of the car company showed
a credit of about $140,000.00. The day after it showed a
14 liability to the car company of nearly $485,000.00, and, as before stated, ten days later it had grown to be over one million five hundred thousand dollars. In addition to the concealment of the condition of the account between the car company and Seymour, Sabin & Co. by omitting to make proper charges thereon the said Sabin and O'Gorman, for the purpose of misleading and deceiving the stockholders of the car company as to its true condition, in the month of February, 1883, caused a fictitious entry to be made on the books of said company, for the purpose of increasing its apparent profits, of $302,101.98, which entry was made by the defendant O'Gorman after having reported to Mr. Sabin, the president, that the profits were $22,000.00 upon the direction of said Sabin to make profits show at least $300,000.00. The effect of such entry was to increase the profits from the amount of $22,000.00, as ascertained from actual inventory and an examination of the books, to the fictitious amount of $324,000.00, and at a stockholders' meeting held shortly thereafter Mr. O'Gorman, in his official capacity as auditor,

made a report to the meeting that the profits were $324,000.00, and, acting upon that report, a dividend was ordered which could be paid only out of the capital of the corporation. Various schemes were resorted to by the defendants Sabin and O'Gorman for the purpose of raising money for the use and benefit of Seymour, Sabin & Co., among which was the creation of the corporation known as the Chicago Railway and Equipment Company, which was incorporated under the laws of the State of Wisconsin in the month of January, 1883, for the purpose of purchasing the cars manufactured by the Northwestern Manufacturing and Car Company and handling the same through a car-trust arrangement. It was represented by Mr. Sabin, who was the largest stockholder in the concern, that the said corporation had an authorized capital of two million dollars, of which $600,000.00 had been subscribed and twenty per cent. called in, and that the subscribers were among the largest shippers and wealthiest parties of the northwest and were amply and fairly responsible for the entire subscription made, and that therefore the capital might be considered as fully
15 equivalent to $600,000.00 paid in. Growing out of this arrangement was the issue of a large amount of the paper of the Chicago Railway and Equipment Company, which paper purported on its face to be one of a series of 25 notes of even date for $5,000.00 each, all of which notes were given for the purchase of 250 railway freight cars manufactured by the payee, the Northwestern Manufacturing and Car Company, and sold by said payee to the said Chicago Railway and Equipment Company, which cars are described by numbers and marked, and it is recited in said note that it was agreed by the maker thereof that the title to the cars should remain in the car company until all the notes of said series, both principal and interest, had been fully paid, all of said notes being equally and ratably secured on said cars. These notes were usually signed by George R. Burrows, vice-president, and endorsed "The Northwestern Manufacturing and Car Company," per J. C. O'Gorman, treasurer. Your orators are advised and believe that the full number of cars manufactured and sold to the Chicago Railway and Equipment Company have never at any time exceeded 250 in number, substantially enough to secure the payment of one set of notes, 25 in number, of $5,000.00 each, and yet between the month of January, 1883, and the 10th day of May, 1884, there was issued by the Chicago Railway and Equipment Company, payable to the order of the Northwestern Manufacturing and Car Company, 260 notes of the character above mentioned, for the sum of $5,000.00 each, amounting in the aggregate to $1,300,000.00, which were endorsed by the said car company and put into the market and sold, and of which notes there were outstanding at the time of the failure about $285,000.00 in amount with the car company indorsement thereon and for the payment of which the said company is liable, the holders of which paper have been and are wholly unable to find any of the collateral mentioned in said notes, and which were supposed to be security for their payment. Your orators charge that the entire amount realized upon such outstanding paper was absorbed and used by said corporation of Sey-

mour, Sabin & Co., and that the railway equipment company
16 was organized for the purpose of manufacturing paper of the character above set forth to be used in the interest of said Seymour, Sabin & Co.; and your orators charge on information and belief that the said Chicago Railway and Equipment Company never in fact had any assets or any valid subscription; that no money was ever in good faith contributed to or applied to the same, and that the said corporation is absolutely worthless and wholly insolvent and always has been. In addition to the paper of the Chicago Railway and Equipment Company there was also used the accom-odation paper of J. H. Townsend & Co., payable to the car company, endorsed by it, and delivered to Seymour, Sabin & Co., and used by the latter during the business career of the car company to the extent of over one million dollars. This partnership was composed of J. H. Townsend, Dwight M. Sabin, and George M. Brush and is now insolvent and in the hands of a receiver. There was also used from time to time in the same manner and for the same purpose a very large amount of paper executed by the Union Depot Street Railway and Transfer Company to the order of the car company and endorsed by it, which transfer company is also worthless and in the hands of a receiver. The same is true of the Duluth Iron Company and of the Iron Mountain Furnace Company, whose paper was largely furnished for the same purpose and in the same manner, and much of which is still outstanding with the car company endorsement upon it, and for the payment of which the car company is liable, and it is believed that none of said corporations whose paper has been so used for the benefit of Seymour, Sabin & Co. are responsible or able to pay any portion of such paper. For the accom-odation of the corporation of Seymour, Sabin & Co. the said defendants, Dwight M. Sabin and Joseph C. O'Gorman, on the 25th day of January, 1884, caused to be executed by the Northwestern Manufacturing and Car Company and delivered to N. W. Kitson the note of said corporation for the sum of $250,000.00, payable one year from the date thereof, which note on the 1st day of April, 1884, was charged to said Seymour, Sabin & Co. upon the books of the car company; and your orators charge
17 that thereby and in that manner the said car company, through the unauthorized acts of its two officers aforesaid, was defrauded out of that amount.

Your orators charge upon information and belief that the officers aforesaid, for the purpose of furnishing money to said Seymour, Sabin & Co. or as an equivalent for money previously advanced, received from them and credited up to their account from time to time the notes and accounts held by said Seymour, Sabin & Co. against third parties to a large amount, which had to be carried by the car company and renewed from time to time, and many of which ultimately proved worthless and were a total loss to the said car company.

And your orators further show that the said president and auditor of the car company never at any time nor in any manner obtained from the board of directors any authority to issue the paper

of said company, or to endorse in its corporate name any paper for the accommodation and benefit of other corporations or individuals, or to use its corporate funds or assets for such purposes, but, on the contrary, the fact that the name, credit, moneys, and assets of the car company were being so used was at all times carefully and fraudulently concealed from the board of directors and the stockholders thereof by the said officers.

Your orators further show that on the 10th day of May, 1884, in certain proceedings commenced on that day in the circuit court for the county of Washington, in the State of Minnesota, wherein E. L. Hospes *et al.* were complainants and The Northwestern Manufacturing and Car Company defendants, Edward S. Brown was appointed receiver of the estate and effects of said corporation, who has ever since and now holds and is in possession of the same, and that at or about the same time, in certain proceedings commenced in the same court, wherein one McKusick was complainant and said Seymour, Sabin & Co. defendants, the defendant Joseph C. O'Gorman was appointed receiver of the estate and effects of that corporation and is still in the custody and possession thereof; and your orators charge that the estate and effects of the latter corporation are scarcely more than sufficient to pay and discharge the necessary costs and expenses of converting the same, while the estate and assets of the car company are nominally and at their face sufficient to cover the indebtedness of said corporation, although it is not probable that in the hands of the receiver or upon a sale they will realize enough to pay fifty cents on the dollar of such claims, and it is absolutely certain that the capital of said corporation during its brief business career of two years has been wholly and entirely lost; and your orators charge that said loss or the greater portion of it is wholly attributable to the misconduct of the defendants herein and to their fraudulent use of the corporate name and credit and misappropriation of the corporate funds and assets for the benefit of other corporations, and chiefly for the corporation known as Seymour, Sabin & Co.

18

Your orators show that on the 6th day of September, 1887, they caused to be presented to the district court at Stillwater the petition of the receiver of the car company setting forth that on or about the 1st day of September, 1887, he had received a request from certain persons and banks, among whom were your orators, to commence a suit against D. M. Sabin, the former president, and J. C. O'Gorman, the former auditor and treasurer, of said car company, to recover such sums of money from them and the value of such property as had been lost to the corporation through their official misconduct while acting as such officers; that such request was based upon the facts elicited upon the trial in said court of the liability of the Northwestern Manufacturing and Car Company upon the preferred stock of Seymour, Sabin & Co., and which facts it was claimed established a liability against said defendants in a large amount of money, to wit, $1,500,000.00; that said receiver did not deem it expedient to commence such action at said term without authority and sanction of the court. The request made upon the receiver was attached and

made an exhibit to his petition. The said receiver prayed that such order might be made and direction given in the premises as the court might deem just and expedient. Upon the presentation of this petition the court made the following order:

19 "The above and foregoing application was duly submitted to the court at a term thereof duly held at the court-house, in the city of Stillwater, in said county, on Tuesday, the 6th day of September, A. D. 1887, and after hearing of all parties desiring to be heard and after due consideration the application is denied."

Your orators are advised and verily believe that because of the unauthorized and fraudulent acts of said officers as aforesaid and of the loss sustained by the Northwestern Manufacturing and Car Company in consequence thereof a right of action exists in favor of said corporation against said officers to recover the amount of such loss; that upon the dissolution of said corporation and the appointment of a receiver such right of action passed to the receiver, who primarily is the only person now authorized to bring such suit; that having made application to the receiver to bring such suit, which application has been duly presented to the court, and authority to bring such action having been refused, that your orators, acting in their own behalf and in behalf of the other stockholders of said corporation, if they should choose to come in and be made parties to these proceedings, have the right to mai-tain said action for the common benefit of all parties interested in the result thereof, and that the said defendants ought to be required to satisfactorily account for the assets placed under their control as the officers and financial managers of the Northwestern Manufacturing and Car Company.

Inasmuch, therefore, as your orators are without relief in the premises in a court of law, they bring this action in this court of equity, where the grievances herein complained of are fully cognizable and relievable, and ask that the defendants and each of them may be required to answer this bill, their answer under oath being hereby expressly waived, and all of the matters and things herein charged as specifically and particularly as if the same were here again recited in the form of special interrogatories, and particularly that they make a just, true, and full accounting with refre-

20 ence to the business of the Northwestern Manufacturing and Car Company, and of the money and assets which came to their possession as officers thereof, and of such moneys as may have been used by them for the benefit of other corporations, and all use of the corporate name and credit of said corporation made by them as such officers for the benefit of individuals and other corporations upon which a liability has been created and which now exists against the Northwestern Manufacturing and Car Company, and that the said defendants may be decreed to pay for the benefit of the parties entitled thereto, whether creditors or stockholders of the Northwestern Manufacturing and Car Company or both, such sums of money as may be found to be legally or equitably due from and owing by them upon such accounting, and that the moneys so paid may be distributed under the order of this court as justice and equity may

seem to require, and for such further and other relief as may be agreeable to equity.

To the end, therefore, that the said defendants may, if they can, show cause why your orators should not have the relief herein prayed for, may it please your honors to grant unto your orators the writ of subpœnae of the United States of America issuing out of and under the seal of this honorable court, directed to the said Dwight M. Sabin and Joseph C. O'Gorman, defendants, commanding them and each of them, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and ther- to answer all and singular the premises and to stand to, abide, and perform such further order, direction, and decree as may be made against them.

HENRY H. PORTER.
R. R. CABLE.

CLAPP & MACARTNEY,
Solicitors for Complainants.
J. M. FLOWER & S. U. PINNEY, *Of Counsel.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

21 Henry H. Porter, being duly sworn, deposes and says that he is one of the complainants in this suit and makes this affidavit in his own behalf and that of his co-complainant; that he has read the *froegoing* bill and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

HENRY H. PORTER.

Subscribed and sworn to before me this 8th day of September, A. D. 1887.

SIMEON W. KING,
U. S. Commissioner in and for the Northern District of Illinois, Residing at Chicago, Cook County, State of Illinois.

(Endorsed:) Filed Sept. 9th, 1887. Oscar B. Hillis, clerk.

22 And on the same day, to wit, September 9th, 1887, the following chancery subpœna was issued out of this court; which said chancery subpœna is in the words and figures following, to wit:

Chancery Subpœna.

23 UNITED STATES OF AMERICA, }
District of Minnesota. }

The President of the United States of America to Dwight M. Sabin & Joseph C. O'Gorman, Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States for

the district of Minnesota on the first Monday of October next, at the city of St. Paul, then and there to answer the bill of complaint of Henry H. Porter and Ransom R. Cable, citizens of the State of Illinois, filed against you on the 9th day of September, A. D. 1887; hence fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 9th day of Sep-
[SEAL.] tember, 1887.

Issued, at my office, in the city of St. Paul, under the seal of said circuit court, the day and year last aforesaid.

OSCAR B. HILLIS, *Clerk*,
By LESLIE P. RICHARDSON, *Deputy*.

MEMORANDUM.—The above-named defendants to enter their appearance in this suit, in the clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken *pro confesso*.

OSCAR B. HILLIS, *Clerk*,
By L. P. RICHARDSON, *Deputy*.

CLAPP & MACARTNEY,
Complainants' Solicitors.
J. M. FLOWER,
S. U. PINNEY, *Of Counsel.*

I hereby certify that I have served the annexed chancery
24 subpœna on the herein-named defendant, Joseph C. O'Gorman, personally by handing to and leaving with him a true copy thereof at Stillwater, in said district, on the 10th day of Sept., 1887.

W. N. CAMPBELL,
U. S. Marshal.

I hereby certify that I served the annexed chancery subpœna on the therein-named defendant, Dwight M. Sabin, by handing to and leaving a true copy thereof for him with his wife, an adult person, then a member of and resident in the family, at the usual place of abode of the said Dwight M. Sabin, at Stillwater, in said district, on the 10th day of Sept., 1887.

W. N. CAMPBELL,
U. S. Marshal.

(Endorsed:) Filed Sept. 12th, 1887. Oscar B. Hillis, clerk.

25 And afterwards, to wit, on the 3rd day of October, 1887, pursuant to a præcipe filed herein, the appearance of defendants was entered in this cause in the words and figures following, to wit:

Appearance.

26 U. S. Circuit Court, Dist. of Minn.

Oct. 3, 1887.

HENRY H. PORTER *et al.*
vs.
DWIGHT M. SABIN *et al.*

And now come the defendants, by Fayette Marsh, solicitor, on whose motion it is ordered that the appearance of said defendants be, and the same is hereby, entered.

27 And afterwards, to wit, on the 31st day of October, 1887, the demurrer of defendants was filed in this cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

28 In the Circuit Court of the United States for the District of Minnesota. In Equity.

HENRY H. PORTER & RANSOM R. CABLE, Complainants,
vs.
DWIGHT M. SABIN & JOSEPH C. O'GORMAN, Defendants.

The demurrer of Dwight M. Sabin and Joseph C. O'Gorman, the above-named defendants, to the bill of complaint of the above-named complainants.

These defendants and each of them, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show—

1st. That it appears upon the face of said bill that this court has no jurisdiction of the matters therein set forth, and has no jurisdiction to grant to the complainants the discovery or relief or any part thereof therein prayed, or any discovery or relief whatever, from or against these defendants or either of them, but that the district court of Washington county, Minnesota, is the only court having jurisdiction in the premises.

And for further cause of demurrer these defendants show—

2nd. That the complainants have not in and by their said bill made or stated such a case as entitles them in a court of equity to any discovery or relief from or against these defendants or either of them as to the matters contained in said bill or any of such matters.

And for further cause of demurrer these defendants show—

3rd. That it appears by the complainants' own showing in the said bill that the Northwestern Manufacturing & Car Com-
29 pany mentioned in said bill, and also E. S. Brown, the receiver of said corporation, also mentioned in said bill, are

necessary parties to said bill; because it is expressly stated in said bill that the liability to account and make payment with which these defendants are in said bill charged is a liability primarily due to said corporation or its said receiver, and not to the said complainants; but yet the said complainants have not made either said corporation or said Brown a party to said bill.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur thereto and demand the judgment of this court whether they or either of them shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

GEO. B. YOUNG,
FAYETTE MARSH &
DAVIS, KELLOGG & SEVERANCE.
Solicitors for Dwight M. Sabin & Joseph C. O'Gorman, Defendants.

I certify that in my opinion the above demurrer is well founded in point of law.

GEO. B. YOUNGS & C. K. DAVIS,
Counsel for Dwight M. Sabin & Joseph C. O'Gorman, Defendants.

UNITED STATES OF AMERICA, *District of Minnesota*, } ss:

Dwight M. Sabin and Joseph C. O'Gorman, the above-named defendants, having been duly sworn, do depose and say each for himself that the above demurrer is not interposed for delay.

DWIGHT M. SABIN.
JOSEPH C. O'GORMAN.

Subscribed and sworn to before me this 28th day of Oct., A. D. 1887.

A. E. DOE,
Notary Public, Ramsey Co., Minn.

(Endorsed:) Filed Oct. 31st, 1887. Oscar B. Hillis, clerk.

30 And afterwards, to wit, on the 7th day of January, 1888, an ammended and supplemental bill of complaint was filed in this cause; which said amended and supplemental bill is in the words and figures following, to wit:

Amended and Supplemental Bill.

31 GENTLEMEN: Take notice that on the 16th day of January inst., at the opening of court on that day or as soon thereafter as counsel can be heard, application will be made to said court, at the United States court-room, in the city of St. Paul, in said district, upon the papers and proceedings on file in the above-entitled cause and upon the within petition, for leave to file the annexed

amended and supplemental bill of complaint and for such other or further order — relief as may be just and proper.

Yours, &c., CLAPP & MACARTNEY,
Solicitors for Compl'nts.

To George B. Young, Fayette Marsh, and Davis, Kelogg and Severance, solicitors for defend't-.

32 Circuit Court of the United States for the District of Minnesota.

HENRY H. PORTER & RANSOM R. CABLE, Complainants,
vs.
DWIGHT M. SABIN & JOSEPH C. O'GORMAN, Defendants. } In Chancery.

Amended and Supplemental Bill of Complaint.

To the judges of the circuit court of the United States for the district of Minnesota, in chancery sitting:

Henry H. Porter and Ransom R. Cable, who are citizens of the State of Illinois and stockholders of the Northwestern Manufacturing and Car Company, which is a corporation organized under the laws of the State of Minnesota, on their own behalf and on behalf of all other persons in like interest and estate with your orators in relation to the matters and things herein charged and set forth, by leave of court first had and obtained, file this their amended and supplemental bill of complaint in the above cause against Dwight M. Sabin, the former president, and Joseph C. O'Gorman, the former auditor and treasurer, of said Northwestern Manufacturing and Car Company, both of whom are citizens of the State of Minnesota and residents of the district in which this suit is brought, and the Northwestern Manufacturing and Car Company, which is likewise a citizen of said State of Minnesota, and the Minnesota Thresher Manufacturing Company, which is a corporation duly organized under the laws of the State of Minnesota and a citizen of said State, and both of which said corporations are residents of said district; and thereupon your orators complain and say—

33 That Henry H. Porter, one of the complainants herein, is the legal owner and holder of two thousand shares of the preferred stock of said Northwestern Manufacturing and Car Company, of the face value of fifty dollars each, amounting in the aggregate to one hundred thousand dollars; that a single certificate was issued to him therefor, which bears date on the tenth day of May, 1882, and which stock was purchased and paid for and the certificate therefor received by him on or about the twentieth day of June, 1882, and that he has ever since been and is now the holder and owner of said shares of stock, and was a shareholder during the time that the transactions herein complained of took place.

That the said complainant, Ransom R. Cable, is the legal holder

and owner of five hundred shares of fifty dollars each of the preferred stock of said corporation, amounting in the aggregate to twenty-five thousand dollars, the certificate of which bears date on the twenty-eighth day of December, 1882, at or about which time the same was delivered to and paid for by the said Cable, who has ever since been the owner and holder of said stock, and that during the time that he has been such shareholder most of the transactions herein complained of, to wit, those occurring after said December 28th, 1882, occurred.

Your orators further state that this suit is not a collusive one on their part or the part of either of them to confer upon this court jurisdiction of the case which it would not otherwise have cognizance of.

And your orators further show that the said Northwestern Manufacturing and Car Company is a corporation organized on the twenty-fifth day of April, 1882, pursuant to and in conformity with an act of the legislature of the State of Minnesota entitled "An act relating to manufacturing corporations," approved March 7th, 1873, and the several acts of said legislature amendatory thereof; that the objects for which said corporation was formed are stated in its articles of association to be the manufacture, building, and sale of steam engines of all kinds and the manufacture, building, and sale of passen-
34 ger cars, freight cars, cattle cars, flat cars, and all other kinds of cars, and the fixtures and attachments thereto belonging, and the manufacture and sale of farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements, and machinery in which wood and iron form the principal component parts, and the manufacture of the materials therein used. The capital stock of said corporation was fixed at five millions of dollars, divided into one hundred thousand shares of fifty dollars each. It was further stated in said articles of association that the corporation should commence on the tenth day of May, 1882, and should continue in existence for a term of thirty years, and that the principal place of business should be in the city of Stillwater, in the county of Washington, in the state of Minnesota; that on the twelfth day of May, 1882, a certificate of the objects for which said company was formed, the amount of the capital stock, the amount actually paid in, and the number of shares by each respectively owned, signed by its president and a majority of its directors, was filed in the office of the secretary of state for the State of Minnesota, and on the thirteenth day of May, 1882, a like certificate was for the first time filed in the office of the register of deeds for said county of Washington: that the first meeting of the corporators for the purpose of completing the organization of said company was held on the tenth day of May, 1882, at which meeting a resolution was passed classifying the stock of said corporation into preferred and common stock, and fixing the amount of the former at three millions of dollars, or sixty thousand shares at fifty dollars each, and the latter at two millions of dollars, or forty thousand shares at fifty dollars each, and providing that the preferred stock should draw a dividend of eight per cent. per annum, to be due and payable in quarterly or semi-an-

nual installments, as the directors might determine, commencing January 1st, 1883, and which should be declared and paid from the net earnings of the company prior to any dividend on the
35 common stock. At said meetings the forms of certificates for preferred and common stock to be issued by said corporation were adopted, which said forms are hereto annexed and marked respectively "Exhibits A & B" and made a part of this bill.

And your orators further state and show that at the said meeting of the stockholders held on the 10th day of May, 1882, and at a directors' meeting held on the same day resolutions were adopted authorizing the purchase by the said corporation, through one H. W. Cannon, who appears to have been an agent or trustee appointed for the purpose, of the assets, business, good will, &c., of the corporation known as Seymour, Sabin & Co. to the extent of $4,117,000, to be paid for in the stock of said Northwestern Manufacturing and Car Company, at the face value thereof, in the proportion of $2,617,000 of preferred stock and $1,500,000 of the common stock of said company, upon condition that when the transfer of said property was fully completed the said property so transferred should be free and clear of all claims, liens, and demands, legal or equitable, of said Seymour, Sabin & Co., its stockholders, creditors, or other persons.

And your orators further state and show that at a meeting of the directors of said Northwestern Manufacturing and Car Company held on the 11th day of May, 1882, a report was made by a committee representing said corporation that the assets of said Seymour, Sabin & Co. to the amount and value of $4,117,000 had been duly transferred and delivered to said corporation, and that 30,000 shares, amounting to $1,500,000, of the full-paid preferred stock of the car company, and 15,000 shares, amounting to $750,000, of the full-paid common stock of the corporation had been paid on account of said purchase, and that the committee still retained in its hands, to be held by it until all the debts of Seymour, Sabin & Co. were fully paid and all liens on said property so transferred were discharged, $1,117,000 of the full-paid preferred stock of the corporation. On the same day a bill of sale and conveyance was made by said Seymour, Sabin & Co. to the said Northwestern Manufacturing and Car Company, transferring to said car company for the consideration hereinbefore mentioned the good will of said Seymour, Sabin &
36 Co. as a manufacturing corporation, together with the assets, both real and personal, therein described, covenanting that said Seymour, Sabin & Co. had an absolute and indefeasible title to all and singular the property therein specified, and that all the rights, interests, property, and estate thereinbefore specified and transferred were free and clear of all encumbrances, claims, or liens whatever.

Your orators further show that after the purchase of the assets aforesaid and the payment therefor in preferred and common stock of said corporation there remained undisposed of $383,000 of the preferred stock of said Northwestern Manufacturing and Car Company and $500,000 of the common stock thereof; that said preferred stock was subsequently disposed of and the money realized thereon

to the extent of $383,000 was paid into the treasury of said corporation, and that it appears from the books of said corporation that from and after the 4th day of September, 1882, there was outstanding and in the hands of stockholders scattered throughout the country $3,000,000 of the preferred stock of said corporation and $1,500,000 of the common stock of said corporation; and it further appears from the books of account of said corporation that there was in possession of its officers money and assets at that time to the amount and apparent value of $4,500,000.

Your orators further allege upon information and belief that of the tangible and equitable assets so purchased and paid for in the preferred stock of said corporation at least $600,000 of the most available portion thereof was not in fact delivered to the said car company at the time of said purchase, and a considerable portion of the same was never delivered at any time, which facts were not known to either of your orators until after the failure of the car company hereinafter set forth; that the said defendants, Dwight M. Sabin and Joseph C. O'Gorman, knew at the time of the organization of the said Northwestern Manufacturing and Car Company and of the pretended delivery of all of the assets of Seymour, Sabin & Co. to it that at least $600,000 of the thresher bills receivable, so called,

37 were not in fact delivered and were not at that time within the control and custody of Seymour, Sabin & Co., but that the same were pledged for the payment of Seymour, Sabin & Co.'s debts, and that said corporation was not in fact able to make such delivery.

Your orators further show that on the 10th day of May, 1882, at the first meeting of the stockholders of said corporation, the defendant Joseph C. O'Gorman was elected one of the directors thereof, and on the same day, at a meeting of its board of directors, he was elected the auditor of said corporation, and it thereupon became his duty as such auditor, under the by-laws adopted at such meeting, to keep the books and take charge of and safely keep all evidences of debt belonging to the corporation and to collect and disburse all moneys belonging to the corporation, and when requested by the board of directors to make a statement showing the financial condition of the corporation; that said O'Gorman continued to hold said position of auditor until the 21st day of September, 1883, at which time he was elected treasurer of said corporation, and continued to act as such until the failure of said corporation. At the same meeting C. D. Gilfillan was elected the president of said corporation, and continued to act as such until about the 25th day of June, 1882; that at a meeting of the board of directors of said corporation held on the 9th day of June, 1882, the defendant D. M. Sabin was elected a director thereof, to fill a vacancy in the board caused by the resignation of one of its members, and on the same day the resignation of C. D. Gilfillan, president, was presented, to take effect June 25th, 1882, and the defendant Sabin was elected president of said corporation, to enter upon the duties of his office upon the creation of a vacancy therein by the resignation of said Gilfillan, and that thereafter and at the time

stated the said Sabin accepted the position of president of said corporation and entered upon the discharge of his duties, and continued as such president during the whole period of the subsequent corporate existence of said company, and that under the by-laws adopted by the board of directors thereof the president had general supervision and direction of the affairs and business of the corporation, subject to the order of the board of directors, and was required to preside at all meetings of the stockholders and of
38 the board of directors, and unless otherwise specially ordered was required to sign all certificates of stock, contracts, and legal papers to which the corporation was a party, except as provided in article number 15 of said by-laws. Article No. 15 aforesaid relates to the signing of papers of value and is as follows:

"All promissory notes, checks, drafts, bills of exchange, and all commercial paper of this corporation shall be signed by the president, vice-president, secretary, assistant secretary, or treasurer and countersigned by the auditor, or in case he is unable to act by one of the officers above named, but in no case shall the same officer sign and countersign the same paper. Any checks, drafts, or bills of exchange which may be deposited to the credit of this corporation in any bank may be endorsed payable to said bank for the credit of the corporation, and all promissory notes, bills of exchange, or acceptances of others discounted or sold by this corporation may be endorsed for such purpose, and all drafts upon this corporation for merchandise or material purchased or for sums that may be due from this corporation to others may be accepted or endorsed, as the case may be, by any one of the officers of this corporation. All orders or contracts for the purchase of merchandise or material for use in the manufacturing or other business of this corporation shall be signed by the purchasing agent of the corporation or by any one of its officers and countersigned by either of its officers: Provided that in no case shall the same officer both sign and countersign the same paper; and provided, however, that orders or contracts for $2,000 or less may be signed by the purchasing agent or any officer of this corporation and not require countersigning: Provided that purchases amounting to over $10,000.00 shall require the approval of both the president and secretary, and purchases exceeding in amount the sum of $25,000 shall require the approval of the executive committee."

That at said directors' meeting last mentioned a resolution was passed authorizing the payment or assumption of $250,000.00 of the special preferred stock of Seymour, Sabin & Co., accordinm to
39 the terms of the par value thereof and accrued interest, upon condition that the said Cannon, who, as the agent or trustee of Seymour, Sabin & Co., had subscribed for the capital stock of said corporation, would surrender or release his subscription to the extent of $250,000.00; that *that* thereafter and in pursuance of said resolution the car company did enter into a contract to assume said liability upon said special preferred stock for the consideration mentioned in said resolution; but your orators allege upon information and belief that the preferred stock of the car company to the extent of

$250,000.00, which was to be surrendered in consideration of such assumption of the special preferred stock of Seymour, Sabin & Co. was never in fact surrendered or released, but that the same was delivered to Seymour, Sabin & Co. or to some one to hold in trust for them, and was subsequently wrongfully and by and through the connivance and management of said Sabin and O'Gorman sold and the proceeds realized by said last-named corporation.

Your orators further show that at the time of the organization of the car company or very shortly thereafter it had assets in its possession or to which it was entitled of the fair cash value, including the subsequent payment of moneys for stock by outside parties, of about three millions of dollars and substantially no indebtedness; that from the time of the election of said Sabin as president of said corporation, and during the whole period subsequent of its corporate existence, the said Sabin and the said O'Gorman had practically in their control all the business affairs and finances of said corporation, and it became and was their duty to manage its affairs and conduct its business for the sole benefit of said corporation and its stockholders.

Your orators further show that at the time of the sale by the corporation known as Seymour, Sabin & Co. to the Northwestern Manufacturing and Car Company of its manufacturing business, assets, and good will it was represented by D. M. Sabin to the committee representing the car company that the liabilities of said corporation, including its alleged liability upon the $250,000.00 of special preferred stock, did not exceed the sum of $1,080,000.00, whereas in truth and in fact such liability amounted to over two millions if it did not reach nearly three millions of dollars; that upon the completion of the purchase and the transfer of said assets and the delivery of the stock, common and preferred, of the car company in payment therefor the stockholders of Seymour, Sabin & Co. immediately absorbed and divided up among themselves $1,500,000.00 of the preferred stock and $750,000.00 of the common stock, over one-half of which said common and preferred stock went to and was received and absorbed by the said defendants, Dwight M. Sabin and Joseph C. O'Gorman, leaving as assets for the payment of its debts $1,117,000.00 of the preferred stock of the car company and $750,000.00 of common and but very little else, which assets were wholly insufficient for that purpose.

Your orators further show that between the 10th day of May, 1882, and the 8th day of August following the corporation of Seymour, Sabin & Co., in order to meet its maturing obligations, was compelled to and did negotiate its own paper and that of third parties endorsed by it to the extent of $1,815,656.54. During this same period of time the bills receivable used and discounted by the car company in its own proper and lawful business amount to but $28,700.85. As early as the 28th day of June, 1882, the defendants Dwight M. Sabin, acting as president of the corporation, and Joseph C. O'Gorman, as its auditor, commenced to issue the paper of the car company for the accommodation of Seymour, Sabin & Co., and also at or about that time or shortly thereafter they commenced to use

the credit of the car company for the benefit of Seymour, Sabin & Co. as endorsers upon various classes of accommodation paper issued for the benefit of said corporation of Seymour, Sabin & Co. The first issue of this class of accommodation paper bears date as early as the 15th day of July, 1882, and is made payable to the car company and in some instances charged to the account of Seymour, Sabin & Co. and in others delivered to them and negotiated by them without being charged at all. Prior to the 14th day of August, 1882, there had been
41 delivered to Seymour, Sabin & Co. paper executed by the car company as accommodation paper to the amount of $355,000.00, of which $205,000.00 had been negotiated and only $50,000.00 charged to it. Of accommodation bills receivable, being paper made by third parties for the accommodation of Seymour, Sabin & Co. and guaranteed or endorsed by the car company, there was issued and delivered to Seymour, Sabin & Co. and charged to them upon the books of said company between the time of the organization of the car company and the 1st day of January, 1883, $580,000.00 in amount, and of the same class of paper, being described as paper to the order of the Northwestern Manufacturing and Car Company or accepted by them, but which did not go into the Northwestern Manufacturing and Car Company's accounts, bills receivable or payable, but was paid by the makers of the paper or by Seymour, Sabin & Co., either through them direct or through the car company, in which latter case it was charged to Seymour, Sabin & Co., between the 20th day of October, 1882, and the 30th day of July, 1883, $1,622,405.84 in amount, of which there had been paid on or before that date $622,095.59, leaving outstanding paper with the car company, accommodation endorsement thereon, on the 30th day of July, 1883, to the amount of $1,001,310.25, which at that time did not appear in any manner upon the general books of account of the said corporation. Between the 5th day of July, 1882, and the 30th day of July, 1883, there was put forth in form the commercial paper of the car company, payable to the order of D. M. Sabin, trustee, or Seymour, Sabin & Co., to the amount of $1,766,934.76, of which there was paid on or before July 30th, 1883, or not negotiated, $1,157,541.98, leaving outstanding $609,392.78 of the car company paper delivered to and negotiated by Seymour, Sabin & Co., of which the general books of account of the car company contained at that time no record. These transactions between the Northwestern Manufacturing and Car Company and Seymour, Sabin & Co., consisting chiefly of the use of the credit, money, and assets of the corporation, mainly money and its commercial
42 paper, amount in the aggregate, during the two years of the corporate existence of the car company, to over $12,000,000.00, and were wholly unauthorized, and at the time of the failure of the car company, on the 10th day of May, 1884, there appears from the books of the car company a balance due from Seymour, Sabin & Co. growing out of the transactions aforesaid of $1,539,176.03, which amount was subsequently reduced by sundry entries on said account (whether properly allowed or correctly made or not your orators are not advised) to thes um of $1,043,598.71, which amount

now stands as a direct liability from Seymour, Sabin & Co. to the Northwestern Manufacturing and Car Company arising out of the transactions had between the two corporations in the shape of its accommodation paper by the car company to Seymour, Sabin & Co. during the period aforesaid, and which claim is nearly, if not quite, worthless and the amount thereof a total loss to the car company.

And your orators further show that all of the transactions hereinbefore referred to and consisting of the loan of its corporate name and credit, as well as advances of money and otherwise, for the accommodation of third parties, and particularly of the corporation of Seymour, Sabin & Co., were by said Sabin and O'Gorman intentionally and wrongfully concealed from the great majority of the directors of the corporation and of its stockholders and directors, and that, for the purpose of concealing the same, no proper and accurate account was kept at the time of the occurrences of said transactions upon the books of the company. Large numbers of accommodation notes were issued from time to time and delivered to Seymour, Sabin & Co. or negotiated by them and the proceeds received by them and in many instances credited to their account months before they were charged with the paper upon which the money was raised. The effect of this system of book-keeping was to show for a long time after the organization of the car company an apparent credit balance in favor of Seymour, Sabin & Co., when at all times they were in fact largely the debtors of the car company, and so it would have appeared had the books been honestly and properly kept. It was not until after
43 the failure of the two corporations that a proper adjustment was made of the account and the proper charges made against Seymour, Sabin & Co. and the correct balance due from Seymour, Sabin & Co. to the car company substantially ascertained. As late as the 30th day of April, 1884, eleven days before the failure, the account of Seymour, Sabin & Co. upon the books of the car company showed a credit of about $140,000.00. The day after it showed a liability to the car company of nearly $485,000.00, and, as before stated, ten days later it had grown to be over $1,500,000.00. In addition to the concealment of the condition of the account between Seymour, Sabin & Co. and the car company by omitting to make proper charges thereon various schemes were resorted by the defendants Sabin and O'Gorman for the purpose of raising money for the use and benefit of Seymour, Sabin & Co., among which was the creation of the corporation known as the Chicago Railway and Equipment Company, which was incorporated under the laws of the State of Wisconsin in the month of January, 1883, ostensibly for the purpose of purchasing the cars manufactured by the Northwestern Manufacturing and Car Company and handling the same through a car-trust arrangement. It was represented as a part of said scheme, and by Mr. Sabin, who was the largest stockholder in the concern, that the said corporation had an authorized capital of $2,000,000.00, of which $600,000.00 had been subscribed and twenty per cent. called in, and that the subscribers were among the largest shippers and the wealthiest parties of the Northwest and were amply and fairly re-

sponsible for the entire subscription made, and that therefore the capital might be considered as fully equivalent to $600,000 paid in. Growing out of this arrangement was the issue of a large amount of the commercial paper of the Chicago Railway and Equipment Company, which paper was in a great number of notes, and each purported on its face to be one of a series of twenty-five notes of even dates for $5,000.00 each, all of which notes were given for the purchase of 250 railway freight cars manufactured by the payee, the Northwestern Manufacturing and Car Company, and sold by said payee to the said Chicago Railway and Equipment Com-
44 pany, which cars are described by numbers and marked, and it is recited in said note that it was agreed by the maker thereof that the title to the cars should remain in the car company until all the notes of said series, both principal and interest, had been fully paid, all of said notes being equally and ratably secured on said cars. These notes were usually signed by George R. Burrows, vice-president, and endorsed "The Northwestern Manufacturing and Car Company" by said J. C. O'Gorman as its treasurer.

Your orators are advised and believe that the full number of cars manufactured and sold to the Chicago Railway and Equipment Company have never at any time exceeded five hundred in number, substantially enough to secure the payment of two sets of notes, twenty-five in number, of $5,000.00 each, and yet, between the month of January, 1883, and the 10th day of May, 1884, there was issued by the Chicago Railway and Equipment Company, payable to the order of the Northwestern Manufacturing and Car Company, two hundred and sixty notes of the character above mentioned, for the sum of $5,000.00 each, amounting in the aggregate to $1,300,000.00, which were endorsed by the said car company as aforesaid and put into the market and sold, and of which notes there were outstanding at the time of the failure about $285,000.00 in amount with the car company endorsement thereon, and for the payment of which the said company is liable, the holders of which paper have been and are wholly unable to find any of the collateral mentioned in said notes and which were supposed to be security for their payment. Your orators charge that the entire amount realized upon such outstanding paper was absorbed and used by the said corporation of Seymour, Sabin & Co., and that the railway equipment company was organized for the purpose of manufacturing paper of the character above set forth, to be used in the interest of said Seymour, Sabin & Co.; and your orators charge on information and belief that the said Chicago Railway and Equipment Company never, in fact, had any assets or any valid subscription; that no money was ever in good faith contributed to or applied to the same, and that the said corporation is absolutely
45 worthless and wholly insolvent and always has been. In addition to the paper of the Chicago Railway and Equipment Company there was also used the accommodation paper of J. H. Townshend & Company, payable to the car company, endorsed by it for the accommodation of and delivered to Seymour, Sabin & Co., and used by the latter during the business career of the car com-

pany to the extent of over one million of dollars. This partnership was composed of J. H. Townshend, said Dwight M. Sabin, and George M. Brush, and it is now insolvent and in the hands of a receiver. There was also used from time to time in the same manner and for the same purpose a very large amount of paper executed by the Union Depot Street Railway and Transfer Company to the order of the car company and endorsed by it for accommodation of said Seymour, Sabin & Co., which transfer company is also insolvent and its affairs are in the hands of a receiver. The same is true of the Duluth Iron Company and the Iron Mountain Furnace Company, whose paper was largely furnished for the same purpose and in the same manner, and much of which is still outstanding with the car company accommodation endorsement upon it, and for the payment of which the car company is liable, and it is believed that none of said corporations whose paper has been so used for the benefit of said Seymour, Sabin & Co. are responsible or able to pay any portion of such paper. For the accommodation of the corporation of said Seymour, Sabin & Co. the said defendants, Dwight M. Sabin and Joseph C. O'Gorman, on the 25th day of January, 1884, caused to be executed by the Northwestern Manufacturing and Car Company and delivered to N. W. Kittson the note of said corporation for the sum of $250,000.00, payable one year from the date thereof, which note on the 1st day of April, 1884, was charged to said Seymour, Sabin & Co. upon the books of the car company; and your orators charge that thereby and in that manner the said car company, through the unauthorized acts of its two officers aforesaid, was defrauded out of that amount.

Your orators charge upon information and belief that the officers aforesaid, for the purpose of furnishing money to said Sey-
46 mour, Sabin & Co., or as equivalent for money previously advanced, received from them and credited to their account from time to time the notes and accounts held by said Seymour, Sabin & Co. against third parties to a large amount, which had to be carried by the car company and renewed from time to time, and many of which ultimately proved worthless and were a total loss to the said car company.

And your orators further show that the said president and auditor of the car company never at any time nor in any manner obtained from the board of directors or from the stockholders any authority to issue the paper of said company or to endorse in its corporate name any paper for the accommodation or benefit of other corporations or individuals or to use its corporate funds or assets for such purposes, but, on the contrary, the fact that the name, credit, moneys, and assets of the car company were being so used was at all times carefully and fraudulently concealed from the board of directors and the stockholders thereof by the said officers and each of them.

Your orators further thow that on the 10th day of May, 1884, in certain proceedings commenced on that day in the circuit court for the county of Washington, in the State of Minnesota, wherein E. L. Hospes *et al.* were complainants and The Northwestern Manufactur-

ing and Car Company defendant, upon the return of execution unsatisfied, Edward S. Brown was appointed receiver of the estate and effects of said corporation, who has ever since been and now holds and is in possession of the same, and that at or about the same time, in certain proceedings commenced in the said court, wherein one McKusick was complainant and said Seymour, Sabin & Co. defendants, the defendant Joseph C. O'Gorman, upon the return of execution unsatisfied, was appointed receiver of the estate and effects of that corporation, and he is still in the custody and possession thereof, and your orators charge that the estate and effects of the latter corporation are scarcely more than sufficient to pay and discharge the necessary costs and expenses of converting the same, while
47 the estate and assets of the car company are nominally and at their face sufficient — cover the indebtedness of said corporation, although it is not probable that in the hands of the receiver or upon a sale they will realize enough to pay fifty cents on the dollar of such claims, and it is absolutely certain that the capital of said corporation during its brief business career of two years has been wholly and entirely lost by reason of the premises aforesaid, and your orators charge that said loss or the greater portion of it is wholly attributable to the misconduct of the defendants Dwight M. Sabin and Joseph C. O'Gorman and to their fraudulent and illegal use of its corporate name and credit and misappropriation of its corporate funds and assets for the benefit of other corporations, and chiefly for the corporation known as Seymour, Sabin & Co.

Your orators show that on the 6th day of September, 1887, they caused to be presented to the said district court of Minnesota for Washington county, at Stillwater, the petition of the receiver of the car company, setting forth that on or about the 1st day of Sept., 1887, he had received a request from certain persons and banks, among whom were your orators, to commence a suit against said D. M. Sabin, the former president, and said J. C. O'Gorman, the former auditor and treasurer, of said car company, to recover such sums of money from them and the value of such property as had been lost to the corporation through their official misconduct while acting as such officers; that such request was based upon the facts elicited upon the trial in said court of the liability of the Northwestern Manufacturing and Car Company upon the guaranty of the preferred stock of Seymour, Sabin & Co., and which facts *it was* established a liability against said defendants in a large amount of money, to wit, $1,500,000.00; that said receiver did not deem it expedient to commence such action without authority and sanction of the court. The request so made upon the receiver was attached and made an exhibit to his petition. The said receiver prayed that such order might be made and direction given in the premises as the court might deem just and expedient. Upon the
48 presentation of this petition the holders of a majority of the stock of the said Northwestern Manufacturing and Car Company, acting under the influence and in the interest of said defend-

ants Sabin & O'Gorman, opposed the allowance of said order, and thereupon the court made the following order:

"The above and foregoing application was duly submitted to the court, at a term thereof duly held at the court-ho-se, in the city of Stillwater, in said county, on Tuesday, the 6th day of Sept., A. D. 1887, and after hearing of all parties desiring to be heard and after due consideration the application is denied."

Your orators are advised and are informed and verily believe that because of the unauthorized and fraudulent acts of said officers as aforesaid and of the loss sustained by the Northwestern Manufacturing and Car Company in consequence thereof a right of action exists in favor of said corporation against said officers to recover the amount of such loss; that upon the appointment of a receiver of said corporation as aforesaid such receiver was primarily the proper person to bring such a suit; that having made application to said receiver to bring such suit, which application has been duly presented to the court and authority to bring such action having been refused, that your orators, acting in their own behalf and in behalf of the other stockholders of said corporation if they should choose to come in and be made parties to these proceedings, have the right to maintain said action for the common benefit of all parties interested in the result thereof, and that the said defendants Sabin & O'Gorman ought to be required to satisfactorily account for the assets placed under their control as the officers and financial managers of the Northwestern Manufacturing and Car Company and for all losses sustained by said corporation or its stockholders, caused by the fraud and negligence of said officers.

Your orators further show that all of the fraudulent acts of the said Sabin & O'Gorman herein complained of were committed wholly without their consent and knowledge or the consent or knowledge of either of them, and that they have never ratified or acquiesced in the same; that said wrongful acts were successfully concealed by fictitious book entries or the proper record thereof wrongfully omitted or suppressed, and that the said complainants were not fully advised as to the said fraudulent acts and the extent thereof until shortly prior to the time of the filing of the original bill herein, and that neither of your orators were ever at any time officers or directors of said corporation or in any manner responsible for the proper management of said business; that in order to ascertain the situation of the said Northwestern Manufacturing and Car Company and the losses sustained by it and the causes and extent thereof your orators employed an accountant at their own expense to investigate the books of said corporation with a view of determining who was responsible for its failure and for the losses sustained; that many months were spent in such investigation, and a long, protracted, and tedious trial of a portion of the questions involved had in the district court for the county of Washington, in said State of Minnesota, before it was practically ascertained that the said Sabin & O'Gorman were in a great measure, if not wholly, responsible for the failure of said company and the loss of a greater portion of its assets.

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Your orators further show that after filing the original bill herein and on the same day they made ay application to the district court of Washington county for the entry of an order permitting them to make as party defendant to this action Edward S. Brown, the receiver for the said Northwestern Manufacturing and Car Company, which said application was accompanied with an affidavit showing the filing of said original bill in this court, and that the said action was commenced by your orators in good faith and in the interest of all parties in like estate, together with a copy of the said bill so filed, and that thereupon and upon the hearing of said motion one Henry D. Hyde, claiming to represent creditors and stockholders, and particularly the Minnesota Thresher Manufacturing Company, and who subsequently acted as the agent and trustee for the said
50 Minnesota Thresher Company in the purchase of the assets of said car company, appeared and opposed the application of your orators to be permitted to make the said receiver a party defendant to their suit; and thereupon the court entered an order refusing to permit said receiver to be made a party to this action. At the same time and place a further application was made to said court by your orators to exclude from a contemplated order of sale then pending before it said cause of action set out in said suit so instituted by your orators and all other actions which stockholders could maintain in right of the corporation, which application was likewise refused by the said court.

Your orators further show that the said Northwestern Manufacturing and Car Company has never at any time been dissolved by any competent legal authority, and still has an existance as such, but that all of its corporate property and tangible assets have been taken under said creditors' suit instituted as aforesaid by the said E. L. Hospes and others against the car company and placed in the hands of a receiver of said corporation appointed by the district court of the county of Washington and under an order of said court sold at public auction in gross as a whole, and have been delivered to the purchaser; that no meeting of the stockholders of said car company has been held since the fall or winter of 1884, at which time certain of the directors resigned and others were appointed in their places; that at such last-mentioned meeting the said defendant Sabin was still acting as president of said corporation and the said O'Gorman as treasurer, and that no successors, so far as your orators are advised, have ever been appointed for them or either of them.

Your orators further show that the defendant The Minnesota Thresher Manufacturing Company is a corporation organized under and pursuant to and in conformity with an act of the legislature of the State of Minnesota entitled "An act relating to manufacturing corporations," approved March 7th, 1883, and the several acts of the legislature amendatory thereof; that it is stated in the articles of association that the ob-
51 jects for which said corporation was formed *was* the purchase of the capital stock, evidence of indebtedness issued by it, and the assets of the Northwestern Manufacturing and Car Com-

pany, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidence of indebtedness, or assets, and the manufacture and sale of steam engines of all kinds, farm implements, and machinery of all kinds, and the manufacture and sale of all articles, implements, and machinery of which wood and iron or either of them form the principal component parts, and the manufacture of the materials therein used. The capital stock of said corporation was fixed at $7,000,000, divided into 140,000 shares of $50.00 each, and classified as preferred and common stock, the amount of the preferred stock to be $4,000,000.00 and of the common stock $3,000,000.00. Provision was also made in said articles as to the payment of dividends upon the preferred stock and on the common stock, and giving priority, both as to dividends and, in case of dissolution, as to repayment of the stock to the extent of its par value, to the holders of the preferred stock. Said corporation was organized for the period of thirty years from the 26th day of November, 1884, to be managed by a board of directors, consisting of thirteen stockholders, to be elected annually, and the principal place of business was stated to be the city of St. Paul, in the county of Ramsey, in the State of Minnesota. The objects of said organization were stated by the committee representing the incorporations to be—

First. To buy claims and indebtedness against the old company (car company) by giving to the creditors thereof the preferred stock of the new company at par for their claims, with interest added at the rate of seven per cent. per annum after January 1st, 1885.

Second. To buy the preferred stock of the old company by giving one share of common stock of the new company in exchange for one share of preferred stock of the old company.

Third. To purchase at the judicial sale, which will ultimately be made in the action now pending wherein the present receiver
52 has been appointed, all the assets, including the good will, of the old company as an entirety and as a "going concern."

Fourth. Thereafter to continue the business of the old company in all its branches except the manufacture of cars.

After the organization of the said Minnesota Thresher Manufacturing Company a majority of the creditors of said car company were induced to exchange their claims dollar for dollar for the preferred stock of said thresher company by the false and fraudulent representations of said defendants Sabin & O'Gorman; that the assets of said car company were sufficient to pay said creditors in full and leave a fair margin for its stockholders, and that it was equitable and fair that the stockholders of said car company should have common stock in said thresher company representing such margin in the assets over and above the amount due the creditors. After a small amount of such thresher company common stock had been issued and exchanged dollar for dollar for the preferred stock of the car company said creditors in said thresher company discovered that the assets of said car company were wholly insufficient to pay its debts, and they thereupon, by resolution duly adopted, stopped the further issue of such common stock; at which time the pre-

ferred stock issued was about three times the common stock issued. The first issue of the common stock of said thresher company was made pursuant to a resolution of the board of directors passed Dec. 27th, 1884, which reads as follows:

"Resolved, That the president and secretary be, and hereby are, authorized to issue the common stock of this company to the holders of the preferred stock of the Northwestern Manufacturing and Car Company in exchange therefor, giving one share of the common stock of this company for each share of the preferred stock of the said Northwestern Manufacturing and Car Company, which shall be properly assigned to this company, provided that no such exchanges of stock shall be made until the preferred stock certificates of said Northwestern Manufacturing and Car Company, together with the transfer thereof, shall have been first presented to the executive committee or board of directors and such exchange
53 authorized by it, and provided further that said executive committee or board of directors shall have full power and authority to refuse to make such exchange if in its judgment it is for the best interests of the company."

Under this resolution $664,950.00 of common stock of the thresher company was issued and exchanged for an equal amount of preferred stock of the car company.

On the 9th day of June, 1886, it having been then discovered that there was no surplus of assets beyond the amount required to pay the debts of the car company, and therefore no foundation or basis for the issue of common stock in exchange for the preferred stock of the car company, the executive committee passed the following resolution:

"Resolved, That in the opinion of the executive committee it is inexpedient to issue any further common stock in exchange for the preferred stock of the Northwestern Manufacturing and Car Company."

And thereupon and for a long time thereafter the issue of such common stock was discontinued.

Shortly after the passage of said resolution the creditors of the car company who had then exchanged their claims for preferred stock in the thresher company, and who controlled its management, caused to be passed at a meeting of the directors held August 10th, 1886, a resolution which reads as follows:

"Resolved, under the direction of the executive committee, That the attorney and counsel of this company co-operate with the counsel of other creditors of the Northwestern Manufacturing and Car Company in prosecuting to effect the claims of said last-named company against Seymour, Sabin & Co., the so-called transfer company, and against the shareholders of each of said respective companies, and generally to get in the assets of said car company and to make the same as speedily available as possible; and, further, we are of the opinion and advise that the assets of said corporation, Seymour, Sabin & Co., be sold and the receivership thereof be terminated."

At the time of the passage of this resolution your orator, Henry

H. Porter, was taking an active interest in the pending litigation with reference to the disallowance of certain claims arising
54 upon what is known as the special preferred stock of Seymour, Sabin & Co., guaranteed by the car company, and was in other ways investigating the affairs of said company in the interest both of its creditors and stockholders, and on the 16th day of August, 1886, a second resolution was passed by said directors as follows:

"Resolved, That the counsel of this company and the counsel of H. H. Porter be furnished certified copies of the resolution of the board of directors relating to the prosecution of suits and the collection of assets, and that the counsel of this company is instructed hereby to act in accordance therewith."

At the same meeting the following resolution was also adopted:

"Resolved, That an arrangement be made at the earliest practicable moment to reduce the vote of the common stock of said company from one vote per share to one vote for every five shares of common stock, and that the question be submitted to counsel for his advice and co-operation, and that the vice-president be, and he is hereby, authorized to carry out the purport of the several resolutions passed upon the 10th and 11th inst. by the board of directors, and that passed by the executive committee on the 31st inst., into effect.

Your orators further show that during the summer and fall of 1886 the attorneys of said Minnesota Thresher Manufacturing Company and the attorneys of your orators, H. H. Porter, were jointly consulting and acting together for the purpose of prosecuting all rights of action and all claims held or belonging to the car company against third parties, including the said defendants, Sabin and O'Gorman, in the interest of creditors and stockholders of said car company, and that the resolutions passed as aforesaid were so passed by the preferred stockholders of the Minnesota Thresher Manufacturing Company with the view of protecting their interests as creditors of the car company and of restricting the management of the thresher company to its preferred stockholders, who were the only shareholders in said corporation paying anything for the stock issued; that thereupon and in the latter part of the autumn of 1886, or the early part of December the said defendants, Sabin and O'Gorman, acting in concert, conspiring with other persons, made an effort to acquire the control
55 and management of the said Minnesota Thresher Manufacturing Company, so that they might be enabled to control or suppress all inquiry into their fraudulent mismanagement of the affairs of the car company. For that purpose the said Sabin purchased or caused to be purchased certain preferred stock of the thresher company from divers stockholders thereof, which had been issued to them as creditors of the car company, upon condition that the directors or directors representing the corporations or individuals holding such stock should resign and appoint or permit to be appointed such persons in their places as the said Sabin might name and as would act in his interest; that the said Sabin was so success-

ful in his negotiations that by and through the method aforesaid, on or about the 21st day of December, 1886, at a meeting of the board of directors held at the office of one Henry D. Hyde, in Boston, six of the thirteen directors who had been elected at the previous meeting of the stockholders by such practices as aforesaid resigned their positions as such, and other persons in the interest of said Sabin and O'Gorman were appointed in their places, and thereupon and in that manner and upon inducements and promises made to some of the remaining directors said Sabin and O'Gorman obtained control of the management and the directory of the Minnesota Thresher Manufacturing Company in their interest and for the express purpose of suppressing, as far as they possibly could, all judicial enquiry into their official acts and misconduct. Such management and control continued down to the following June, in 1887. As soon as Sabin and O'Gorman had obtained control and direction in manner aforesaid of the Minnesota Thresher Manufacturing Company, and shortly after the directors thereof were changed in pursuance of the fraudulent scheme aforesaid, at a meeting of the directors held on the 16th day of February, 1887, the following resolution was presented and adopted:

"Resolved, That the following resolution adopted by the executive committee June 9th, 1886, to wit:

Resolved, That in the opinion of the executive committee
56 it is inexpedient to issue any further common stock in exchange for the preferred stock of the Northwestern Manufacturing and Car Company—be, and the same is hereby, amended by adding: 'Excepting in cases where the said preferred stock of the Northwestern Manufacturing and Car Company be placed in the hands of three trustees to be nominated by the executive committee of this company, with the full power to hold, control, and vote the said common stock for the period of five years, with the power to fill any vacancies that may arise, such new persons to be subject to the approval, in writing, of the executive committee,' be, and the same is hereby, ratified and confirmed."

Pursuant to this resolution three trustees were appointed, two of whom had been brokers for said Sabin and the Northwestern Manufacturing and Car Company and only one of whom was a creditor or represented creditors of the car company; and thereupon and prior to the annual meeting of the stockholders held upon the 15th day of June, 1887, there was issued and placed within the control of the three trustees aforesaid the common stock of the thresher company in exchange for preferred stock of the car company to the amount of $1,576,250.00, and there had also been issued and was then and now is outstanding common stock in exchange for such preferred stock to the amount of $468,200.00, making a total of common stock of the thresher company outstanding on the 15th day of June, 1887, of $2,044,450.00. Said common stock so issued and delivered to said trustees was placed in their hands in trust, with an irrevocable power of attorney to the majority of said three trustees to vote the same for five years and having with the other common stock a voting power sufficient to control said thresher company,

and in fact controlling it from then until now in the interests of the said defendants.

Your orators allege that by said scheme the stockholders, or a portion of them, of the car company have placed their stock absolutely within the control of the said defendants, to be handled by three trustees selected by the said Sabin and O'Gorman as they
57 might desire, and in that manner said Sabin and O'Gorman have acquired the control and direction and management of the Minnesota Thresher Manufacturing Company, and are enabled to and will so far as they can do so suppress all enquiry into their official misconduct and mismanagement of the affairs of the car company.

Your orators further show that, having thus acquired the management of the thresher company so as to control the claims of creditors which have been transferred to it in exchange for its stock, as well as the majority of the stock placed in the hands of trustees as aforesaid, said Minnesota Thresher Company, acting under the advise and direction and procurement of the said Sabin and O'Gorman, made an application to the district court of Washington county, of the State of Minnesota, whose receiver was then in possession of the assets of said car company, for an order directing a sale of all the assets and rights of action of said corporation as a whole; that upon the hearing of said motion your orators were represented and protested against such sale of all of said assets, and particularly the sale of such rights of action as the stockholders would have a right to maintain in the name of said corporation if the corporation itself was unable or unwilling to do so or if the receiver was not authorized so to do; that said Minnesota Thresher Company, by its attorneys and otherwise, insisted that all rights of action of every description should be sold with the tangible assets; that Henry D. Hyde, acting for and in behalf of said corporation, was present when the said motions were heard and proceedings had, and opposed all efforts of your orators to exclude such rights of action from such proposed sale, and an order of sale was accordingly entered for a sale of the entire assets of said corporation as a whole, which assets are described in said order of sale as follows: "All the stock, property, things in action, and effects of the defendant, The Northwestern Manufacturing and Car Company, of which E. S. Brown has been appointed receiver in this action or to which the receiver may be entitled as the same shall exist at the time of
58 such sale, including all real estate, buildings, machinery, tools, patterns, fixtures, materials, articles manufactured, unmanufactured, or in process of manufacture, cash in hand, book accounts, letters patent, choses in action, bills receivable, and all other property, assets, claims, liens, and demands of every name and nature, either in law or equity, and wherever situate;" and the said property was sold on the 27th day of October, 1887, to Henry D. Hyde, in trust, for the sum of $1,105,000.75, as agent and trustee of the Minnesota Thresher Manufacturing Co., and that since such sale an order has been entered confirming said sale and directing the receiver, upon payment of the balance of the purchase-money, to turn

over all of the assets included in said order of sale to the Minnesota Thresher Manufacturing Company, as the assignee or otherwise of said Hyde, which said assets have not as yet been delivered, and are described in said order of confirmation as follows:

"The property and assets so often above referred to are hereby ordered to be deeded and conveyed and are as follows, to wit:

"All the stock, property, things *and* action, and effects of the defendant, The Northwestern Manufacturing and Car Company, of which E. S. Brown has been appointed receiver in this action, or to which the receiver may be entitled, as the same shall exist at the time of the making of such deed or deeds of conveyance, including all real estate, buildings, machinery, tools, patterns, fixtures, materials, articles manufactured, unmanufactured, or in the process of manufacture, cash in hand, book accounts, letters patent, choses in action, bills receivable, and all other property, assets, claims, or demands of every name and nature, either in law or in equity, and wherever situate."

Your orators further show that none of the rights of action which a stockholder would be permitted to maintain in right of the corporation, in the event that said corporation or its directors refused to bring suit, were specifically mentioned or described in said order of sale or in the order confirming the same or in the instruments transferring and conveying the same, and if such rights of action were sold or intended to be sold or could be they were not described in such manner as to enable any one intending to bid for such assets to know that such a right of action existed or was intended to be sold.

59 Your orators allege and insist that by reason of the collusion and fraud hereinbefore set forth and the control obtained by Sabin and O'Gorman of the affairs of the Minnesota Thresher Manufacturing Company and of the knowledge chargeable to said company at and prior to the sale of the assets that your orators had commenced a suit in this court to enforce their rights and that of other persons in like estate as against the officers of the car company, whose mismanagement had caused its failure and largely reduced its assets and rendered the stock held by your orators substantially worthless, and because having obtained or sought to obtain such rights of action for the purpose of suppressing them and defrauding your orators and others in like estate out of their rights in the premises; that the said Minnesota Thresher Company has become a party to said fraudulent scheme of the said Sabin and O'Gorman, and is not a purchaser in good faith and has acquired no title to such rights of action by virtue of the sale aforesaid or any of the proceedings had thereunder in said district court for Washington county.

Your orators further show that the existing board of directors of the defendant, The Northwestern Manufacturing and Car Company, is under the control of the said defendant, Dwight M. Sabin, who is a member of said board and the president of said corporation, and that two-thirds of the preferred stock of the said corporation is now under the control of the Minnesota Thresher Manufacturing Com-

pany and of the three trustees hereinbefore mentioned, who hold and control the same for the benefit and in the interest of the said Dwight M. Sabin, and that therefore any application to the said corporation, the Northwestern Manufacturing and Car Company, or its said board of directors to bring a suit against the said Dwight M. Sabin and Joseph C. O'Gorman to recover damages for their fraudulent acts as officers of said corporation would be entirely useless and unavailing, and such was the condition of the matter at the time of the filing of the original bill herein.

Your orators further show that having made application
60 to the district court of Washington county as aforesaid to authorize its receiver to institute a suit against the said Sabin and O'Gorman as aforesaid, and the refusal of the court to make an order in the premises, that court divested itself absolutely and entirely of all control over the same, and that thereupon such suit could only be maintained in right of said corporation by some person or persons in privity with said corporation.

Your orators further state that they are advised and verily believe that the rights of action involved in this suit are of such a character that they can only be prosecuted by the corporation or its receiver or some one or more of its stockholders, and that it is not such an action or right of action as the corporation itself or its receiver, acting under the direction of the court, could sell or transfer to a purchaser so as to qualify such purchaser with the right to maintain such action and thereby deprive the stockholders of their rights in the premises.

Your orators further show that the Minnesota Thresher Manufacturing Company, by virtue of its purchase under the order of sale of the assets of the Northwestern Manufacturing and Car Company, acquired no title whatever to the rights of action involved in this suit, and that whether it did or not any such rights are subordinate to those of your orators and other parties in like estate, for the reason that such suit was commenced prior to the entry of such order of sale and after the court had refused to allow its receiver to bring the same, with full notice upon the part of the said purchaser that such suit was pending in behalf of parties entitled to maintain the same.

Inasmuch, therefore, as your orators are without relief in the premises in a court of law, they bring their action in this court of equity, where the grievances herein complained of are fully cognizable and relievable, and make parties defendant hereto Dwight M.
Sabin, Joseph C. O'Gorman, The Northwestern Manufactur-
61 ing and Car Company, and The Minnesota Thresher Manufacturing Company, all of which said defendants are citizens and residents of the State of Minnesota; to the end, therefore, that said defendants and each of them may answer this amended and supplemental bill (there answer under oath being hereby expressly waived) and all of the things herein charged as fully and specifically and as particularly as if the same were here again recited in the form of special interrogatories, and thus show, if they can, why

your orators should not have the following relief herein and hereby prayed:

First. That the said defendants, Dwight M. Sabin and Joseph C. O'Gorman, may be required to make a just, true, and full accounting with reference to the business of the Northwestern Manufacturing and Car Company and all of the moneys and assets which came into their possession as officers thereof and of all such moneys as may have been used by them for the benefit of other corporations or individuals and of all use of the corporate name and credit and assets of said corporation made by them as such officers for the benefit of individuals or other corporations upon which a liability has been created and which now exists against the Northwestern Manufacturing and Car Company.

Second. That the defendant Dwight M. Sabin fully state what claims against the Northwestern Manufacturing and Car Company and what stock of the Minnesota Thresher Manufacturing Company he has purchased or caused to be purchased, from whom the same were purchased, what price he paid for them, and whether any such purchases were coupled with any condition requiring the parties from whom said claims were purchased or their representatives to withdraw from the directory of the Minnesota Thresher Manufacturing Company and permit other parties to be substituted in their places who should be named by him, the said Sabin.

Third. That the said Minnesota Thresher Manufacturing
62 Company be decreed to have acquired no interest whatever in the causes of action or any of them embraced in this suit, or that their interest therein, if any, be declared to be subordinate to the rights and interests of your orators and of all other persons in like estate who may choose to become parties to these proceedings.

Fourth. That the said defendants, Dwight M. Sabin and Joseph C. O'Gorman, may be decreed to pay for the benefit of the parties entitled thereto such sums of money as may be found to be legally or equitably due from and owing by them upon such accounting, and that the moneys so paid may be distributed under the order of this court in such manner as to the court may seem equitable and as justice and equity may seem to require, and for such further and other relief as may be agreeable to equity.

May it please the court to grant to your orators the writ of subpœna commanding the appearance and answer of the defendants, Dwight M. Sabin and Joseph C. O'Gorman, The Northwestern Manufacturing and Car Company, and The Minnesota Thresher Manufacturing Company; but in case any of said defendants have appeared herein, that in lieu of said writ of subpœna your honors may enter a rule herein directing each of said defendants as may have appeared in this case to answer this amended bill at a day to be fixed in said rule, and that said defendants and each of them stand to and

abide by such order and decree herein as may be agreeable to equity and good conscience.

HENRY H. PORTER,
RANSOM R. CABLE,
Complainants.

CLAPP & MACARTNEY,
Solicitors for Complainants.
J. M. FLOWER,
S. U. PINNEY,
Of Counsel.

63 "EXHIBIT A."

Preferred-Stock Certificate.

Northwestern Manufacturing and Car Company.

Capital stock, $5,000,000.00.

$3,000,000.00 preferred stock, $2,000,000.00 common stock, divided into shares of $50.00 each.

CITY OF STILLWATER, }
State of Minnesota. }

This certifies that —— —— is entitled to — shares, of fifty dollars each, of the preferred capital stock of the Northwestern Manufacturing and Car Company, transferable only in person or by attorney on the books of the company upon the surrender of this certificate.

This stock is entitled to a preferred dividend prior to the common or any other stock of the company of eight per cent. per annum, which shall be payable out of the net earnings of the company in quarterly or semi-annual installments, as the directors may determine, commencing with January 1st, 1883, and in case of a voluntary or other dissolution of the company this stock shall to the extent of its par value be first paid out of the assets of the company before any payments shall be made upon the common or any other stock.

The books of transfer shall be closed for fifteen days prior to and on dividend days, and all dividends shall be payable to stockholders of record on the books of the company.

Each share of this stock entitles the owner of record on the books of the company to a vote in all meetings of the stockholders.

This certificate will not become valid until countersigned and registered by the register of transfers of the company.

In witness whereof there is hereto affixed the corporate seal of the said Northwestern Manufacturing and Car Company and the hands of the president and secretary, at the city of Stillwater, in the State of Minnesota, this — day of ——, 188–.

—— ——, *Secretary.* —— ——, *President.*

64 "EXHIBIT B."

Common-Stock Certificate.

Northwestern Manufacturing and Car Company.

Capital, $5,000,000.00.

$3,000,000.00 preferred stock, $2,000,000.00 common stock, divided into shares of $50.00 each.

CITY OF STILLWATER, *State of Minnesota.*

This certifies that —— —— is entitled to — shares, of fifty dollars each, of the common capital stock of the Northwestern Manufacturing and Car Company, transferable only in person or by attorney on the books of the company upon the surrender of this certificate.

This stock is entitled to such dividends as the directors may determine to pay in cash or scrip from the net earnings of the company after paying the dividends on the preferred stock.

The books of transfer shall be closed for fifteen days prior to and on dividend days, and all dividends shall be payable to stockholders of record on the books of the company. Each share of this stock entitles the owner of record on the books of the company to a vote in all the meetings of the stockholders.

This certificate shall not become valid until countersigned and registered by the register of transfers of the company.

In witness whereof there is hereunto affixed the corporate seal of the said Northwestern Manufacturing and Car Company and the hands of its president and secretary, at the city of Stillwater, in the State of Minnesota, this — day of ——, 188–.

—— ——, *Secretary.* —— ——, *President.*

65 In the United States Circuit Court for the District of Minnesota.

HENRY H. PORTER and RANSOM R. CABL-, Complainants,
vs.
DWIGHT M. SABIN and JOSEPH C. O'GORMAN, Defendants.
} In Chancery.

The petition of the above-named complain-t- respectfully shows to said court as follows:

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Henry H. Porter, being duly sworn, deposes and says that he is *is* one of the complainants in the above-entitled action and makes this affidavi*d* for and on behalf of himself and his co-complainant,

Ransom R. Cable; that he has read the proposed amended and supplemental bill which said complainants desire to file in this cause and knows the contents thereof.

That the facts in relation to the commencement of this suit and the filing of the original bill herein and the reasons and necessity for filing an amended and supplemental bill are substantially as follows:

That on the 6th day of Sept., 1887, the receiver of the Northwestern Manufacturing and Car Company, upon the written request of the complainants and certain other parties who were creditors of the said company, presented to the district court of the county of Washington, in the State of Minnesota, by which court said receiver had been appointed, a petition setting forth that on or about the first day of September, A. D. 1887, he had received a request from certain persons, including the said complainants, to commence
66 a suit against Dwight M. Sabin, the former president, and Joseph C. O'Gorman, the former auditor and treasurer, of the Northwestern Manufacturing and Car Company, to recover such sums of money from them and the value of such property as has been lost to the car company through their official misconduct while acting as such officers.

That such request was based upon facts elicited upon the trial in said district court of Washington county of the liability of the Northwestern Manufacturing and Car Company upon the preferred stock of Seymour, Sabin & Co., and which facts, it was claimed, established a liability against said defendants to the amount of about fifteen hundred thousand dollars. The said receiver prayed that such order might be made and directions given in the premises as the court might deem just and equitable.

That upon the presentation of said petition to the said court upon said 6th day of September, A. D. 1887, an order was entered by the court denying said application; that thereupon and on the 9th day of Sept., A. D. 1887, the original bill of complaint was filed in this case, and on the same day a copy of said bill, accompanied by the affidavit of J. M. Flower, of counsel for said complainants, showing that the same was filed in good faith, was presented to the said district court of Washington county and a motion made for leave to make the receiver of said car company a party defendant to this suit, which motion was overruled by the court and the leave prayed for refused.

On the same day a further application was made in behalf of the complainants to the said district court to except from any order of sale which might be entered upon a pending application made by the Minnesota Thresher Manufacturing Company for the sale of the entire assets as a whole of the Northwestern Manufacturing and Car Company, including all its stock, property, things in action, and effects, such rights of action as stockholders of said car company might maintain in right of the corporation, which application was also denied by said court.

67 This affiant further states that he is advised by counsel and verily believes that at the time of the filing of the orig-

64 "EXHIBIT B."

Common-Stock Certificate.

Northwestern Manufacturing and Car Company.

Capital, $5,000,000.00.

$3,000,000.00 preferred stock, $2,000,000.00 common stock, divided into shares of $50.00 each.

CITY OF STILLWATER, *State of Minnesota.*

This certifies that —— —— is entitled to — shares, of fifty dollars each, of the common capital stock of the Northwestern Manufacturing and Car Company, transferable only in person or by attorney on the books of the company upon the surrender of this certificate.

This stock is entitled to such dividends as the directors may determine to pay in cash or scrip from the net earnings of the company after paying the dividends on the preferred stock.

The books of transfer shall be closed for fifteen days prior to and on dividend days, and all dividends shall be payable to stockholders of record on the books of the company. Each share of this stock entitles the owner of record on the books of the company to a vote in all the meetings of the stockholders.

This certificate shall not become valid until countersigned and registered by the register of transfers of the company.

In witness whereof there is hereunto affixed the corporate seal of the said Northwestern Manufacturing and Car Company and the hands of its president and secretary, at the city of Stillwater, in the State of Minnesota, this — day of ——, 188–.

—— ——, *Secretary.* —— ——, *President.*

65 In the United States Circuit Court for the District of Minnesota.

HENRY H. PORTER and RANSOM R. CABL-, Complainants,
vs.
DWIGHT M. SABIN and JOSEPH C. O'GORMAN, Defendants.
} In Chancery.

The petition of the above-named complain-t- respectfully shows to said court as follows:

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Henry H. Porter, being duly sworn, deposes and says that he is *is* one of the complainants in the above-entitled action and makes this affidavid for and on behalf of himself and his co-complainant,

Ransom R. Cable; that he has read the proposed amended and supplemental bill which said complainants desire to file in this cause and knows the contents thereof.

That the facts in relation to the commencement of this suit and the filing of the original bill herein and the reasons and necessity for filing an amended and supplemental bill are substantially as follows:

That on the 6th day of Sept., 1887, the receiver of the Northwestern Manufacturing and Car Company, upon the written request of the complainants and certain other parties who were creditors of the said company, presented to the district court of the county of Washington, in the State of Minnesota, by which court said receiver had been appointed, a petition setting forth that on or about the first day of September, A. D. 1887, he had received a request from certain persons, including the said complainants, to commence
66 a suit against Dwight M. Sabin, the former president, and Joseph C. O'Gorman, the former auditor and treasurer, of the Northwestern Manufacturing and Car Company, to recover such sums of money from them and the value of such property as has been lost to the car company through their official misconduct while acting as such officers.

That such request was based upon facts elicited upon the trial in said district court of Washington county of the liability of the Northwestern Manufacturing and Car Company upon the preferred stock of Seymour, Sabin & Co., and which facts, it was claimed, established a liability against said defendants to the amount of about fifteen hundred thousand dollars. The said receiver prayed that such order might be made and directions given in the premises as the court might deem just and equitable.

That upon the presentation of said petition to the said court upon said 6th day of September, A. D. 1887, an order was entered by the court denying said application; that thereupon and on the 9th day of Sept., A. D. 1887, the original bill of complaint was filed in this case, and on the same day a copy of said bill, accompanied by the affidavit of J. M. Flower, of counsel for said complainants, showing that the same was filed in good faith, was presented to the said district court of Washington county and a motion made for leave to make the receiver of said car company a party defendant to this suit, which motion was overruled by the court and the leave prayed for refused.

On the same day a further application was made in behalf of the complainants to the said district court to except from any order of sale which might be entered upon a pending application made by the Minnesota Thresher Manufacturing Company for the sale of the entire assets as a whole of the Northwestern Manufacturing and Car Company, including all its stock, property, things in action, and effects, such rights of action as stockholders of said car company might maintain in right of the corporation, which application was also denied by said court.

67 This affiant further states that he is advised by counsel and verily believes that at the time of the filing of the orig-

inal bill in this cause the said corporation, known as the Northwestern Manufacturing and Car Company, was not made a party because its said receiver, E. S. Brown, might properly maintain the action against said defendants Sabin and O'Gorman by leave of the court, and that, the said court having refused to authorize such receiver to bring the suit, such receiver might properly be made a party defendant to the suit upon obtaining the permission of such court to do so, and that at the time of filing such bill an application was contemplated to the district court for the purpose of obtaining such premission, with the belief that the same would be granted. Thereafter the court entered an order for the sale of all of the property and assets of the said Northwestern Manufacturing and Car Company as a whole, at public auction, at the front door of the courthouse in the city of Stillwater, in said county of Washington and State of Minnesota, on the 27th day of October, 1887, in which said order of sale the property to be sold was described as follows:

"All the stock, property, things in action, and effects of the defendant The Northwestern Manufacturing and Car Company, of which E. S. Brown has been appointed receiver in this case, or to which the receiver may be entitled as the same shall exist at the time of such sale, including all real estate, buildings, machinery, tools, patterns, fixtures, materials, articles manufactured, unmanufactured, or in process of manufacture, cash in hand, book accounts, letters patent, choses in action, bills receivable, and all other property, assets, claims, liens, and demands of every name and nature, either in law or equity, and wherever situated."

That on the day appointed for said sale, to wit, on the 27th day of Oct., 1887, all of the property mentioned and described in said order of sale was sold to one Henry B. Hyde, at public auction, for the sum of $1,105,000.75; that the said — was acting at that
68 time & bid for said property as the agent of the Minnesota Thresher Manufacturing Company, and thereafter and on the 12th day of Nov., 1887, the referee appointed to make said sale having made his report of same, said district court of the county of Washington entered its order confirming said sale, and directed the receiver, upon presentation of the ref-ree's deed of conveyance and upon payment of the purchase-money thereof, to surrender possession to the said Minnesota Thresher Manufacturing Company, its successors, representatives, or assigns, on demand, of all of the property and assets mentioned and described in said order of sale, and which are again set forth in like terms in said order of confirmation.

Affiant further states that the material allegations contained in said amended and supplemental bill with reference to the organization of the Minnesota Thresher Manufacturing Company and the objects of the organization thereof and the methods adopted by the defendants Sabin and O'Gorman to obtain the control and management of said thresher company for the purpose of acquiring the right of action involved in this suit and suppressing investigation into their official acts are substantially true, and he makes the same a part of this affidavit so far as they are material.

This affiant further states that he is advised by counsel and verily believes that all the allegations in said amended and supplemental bill contained setting forth the various transactions had with reference to the sale of said property and the purchase thereof by the Minnesota Thresher Company are material and important allegations for the purpose of establishing the rights of himself and other stockholders in like estate; that the said district court of Washington county, having refused to permit its receiver to bring such action and having divested itself as far as it could by an attempted sale of the same at public auction, has practically waived and surrendered whatever jurisdiction it might otherwise have had over such cause of action, and that therefore the said receiver
69 is no longer a necessary or a proper party to this suit; that fully two-thirds of the original preferred stock of the Northwestern Manufacturing and Car Company has been surrendered or turned over to the Minnesota Thresher Company and to three trustees selected by or appointed with the approval of said defendant, D. M. Sabin, and that the board of directors of the said Northwestern Manufacturing and Car Company, as well as a large majority of the stock therein, is practically controlled by the said Sabin, and therefore any application which this affiant might make to the board of directors of said car company or its stockholders would be wholly unavailing and useless.

Affiant further states that he is advised by counsel and verily believes that the Northwestern Manufacturing and Car Company and the Minnesota Thresher Manufacturing Company, in view of the change in the condition of the assets of said Northwestern Manufacturing and Car Company and the acquisition thereof by the said Minnesota Thresher Manufacturing Company, which now claims to hold and control the right of action involved in this suit, are proper and necessary parties to the further prosecution thereof, and that they have become so since the filing of the original bill herein.

Affiant further states that the application to file this amended and supplemental bill and the making of this affidavit in support of such application are not made for the purpose of vexation or delay, but that justice may be done, and that the matters and things set forth in said amended and supplemental bill which do not appear in the original bill are material and could not with reasonable diligence have been sooner introduced into this suit.

Affiant therefore prays that they may be allowed to file said proposed amended and supplemental bill, which is herewith presented, and that such order may be made in relation thereto as to the court may seem proper.

HENRY H. PORTER.

70 Subscribed and sworn to before me this 31st day of December, A. D. 1887.

SIMEON W. KING,
United States Commissioner in and for the Northern
[SEAL.] *District of Illinois, Residing at Chicago, in said District and State aforesaid.*

(Endorsed:) Filed January 7th, 1888. Oscar B. Hillis, clerk.

71 Service of the within and for-going notice, petition, and proposed amended and supplemental bill is hereby admitted this 7th day of January, A. D. 1888.

GEO. B. YOUNG,
FAYETTE MARSH,
DAVIS, KELOGG & SEVERANCE,
Defendants' Solicitors.

This bill having been amended, by leave of court, so as to bring in The Northwestern Manufacturing and Car Company and The Minnesota Thresher Manufacturing Company, the defendants, the clerk will please issue subpœna for said new defendants, returnable on the rule day in May, A. D. 1888.

Dated April 2nd, 1888.

CLAPP & MACARTNEY,
Complainants' Solicitors.

72 And afterwards, to wit, on the 2nd day of April, 1888, the following stipulation to make new parties defendant was filed in this cause; which said stipulation is in the words and figures following:

Stipulation to Make New Parties Defendant.

73 In the Circuit Court of the United States, District of Minnesota.

HENRY H. PORTER & RANSOM R. CABLE, Complainants,
vs.
DWIGHT M. SABIN & JOSEPH C. O'GORMAN, Defendants.

It is hereby stipulated by and between the parties, complainants and defendants, in the above-entitled action:

1st. That the motion now pending in said cause on the part of the complainants for leave to file an amended and supplemental bill of complaint therein and to have the Northwestern Manufacturing and Car Company and the Minnesota Thresher Manufacturing Company made parties defendant in said action may be granted, and that said complainants may also further amend their said bill of complaint by striking out words "but not yet delivered," in the tenth line from the bottom of page 27 of said amended and supplemental bill, and inserting in lieu thereof the words "and have been delivered to the purchaser," and also inserting between the ninth and tenth lines from the bottom of page 39 of said amended and supplemental bill the words "or in the instruments transferring and conveying the same."

2nd. That a rule may be entered requiring the above-named defendants to demur, plead, or answer to said amended and supplemental bill on or before the May rule day of this court, and also

directing a subpœna to issue to the defendants, The Northwestern Manufacturing and Car Company and The Minnesota Thresher Manufacturing Company.

3rd. That the defendants, if they shall file a demurrer to the amended and supplemental bill on or before the 20th day of April, A. D. 1888, and immediately thereafter give notice thereof to said complainants, may have said demurrer set down for argument on the May rule day of thes court.

74 Dated March 29th, 1888.

CLAPP & MACARTNEY, *Complainants' Solicitors.*
FAYETTE MARSH, GEORGE B. YOUNG,
DAVIS, KELLOGG & SEVERANCE,
Solicitors for Defendants.

(Endorsed:) Filed April 2nd, 1888. Oscar B. Hillis, clerk.

75 And on the same day, to wit, April 2nd, 1888, the following further proceedings were had and entered of record in Term Minutes "G," page 732, in the words and figures following, to wit:

Orders Making New Parties Defendant.

76 Circuit Court of the United States, District of Minnesota.

HENRY H. PORTER & RANSOM R. CABLE, Complainants,
vs.
DWIGHT M. SABIN & JOSEPH C. O'GORMAN, Defendants.

On reading and filing the stipulation of the parties hereto prefixed—

Ordered that the complainants have leave to file their amended and supplemental bill of complaint heretofore presented and now on file without leave.

Ordered, further, that the Northwestern Manufacturing and Car Company and the Minnesota Thresher Manufacturing Company be, and they are hereby, made parties defendants in said action.

R. R. NELSON, *Judge.*

(Endorsed:) Filed April 2nd, 1888. Oscar B. Hillis, clerk.

77 And afterwards, to wit, on the 20th day of April, 1888, the demurrer of all defendants was filed in said cause; which said demurrer is in the words and figures following, to wit:

Demurrer of All Defendants.

78 United States Circuit Court, District of Minnesota. In Equity.

HENRY H. PORTER & RANSOM R. CABLE, Plaintiffs,
against
DWIGHT M. SABIN, JOSEPH C. O'GORMAN, THE NORTHWESTERN Manufacturing and Car Company, and The Minnesota Thresher Company, Defendants.

The demurrer of the above-named defendants, Dwight M. Sabin, Joseph C. O'Gorman, The Northwestern Manufacturing and Car Company, and The Minnesota Thresher Manufacturing Company to the bill of complaint of the above-named complainants, Henry H. Porter and Ransom R. Cable.

These defendants and each of them, by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, do demur to said bill, and for cause of demurrer show:

First. That it appears upon the face of said bill that this court has no jurisdiction of the matters therein set forth and has no jurisdiction to grant to the complainants the discovery or relief or any part thereof therein prayed or any discovery or relief whatever from or against these defendants or either of them, but that the district court of Washington county, Minnesota, is the only court having jurisdiction in the premises.

And for further cause of demurrer these defendants show:

79 Second. That the complainants have not, in and by their said bill, made or stated such a cause as entitles them in a court of equity to any discovery or relief against or from these defendants or either of them as to matters contained in said bill or any such matters.

And for further cause of demurrer these defendants show:

Third. That it appears by complainants' own showing in the said bill that E. S. Brown, the receiver of the Northwestern Manufacturing and Car Company, mentioned in said bill, is a necessary party to said bill, because it is expressly stated in said bill that the liability to account and make payment with which the defendants Sabin and O'Gorman are in said bill charged is a liability primarily due to said receiver and not to said complainants, but yet the said complainants have not made said Brown a party to said bill. Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur thereto and demand the judgment of this court whether they or either of them shall be compelled to make any further or other answer to the said bill, and

pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

FAYETTE MARSH,
DAVIS, KELLOGG & SEVERANCE &
GEORGE B. YOUNG,
Solicitors for Dwight M. Sabin, Joseph C. O'Gorman, and the Northwestern Manufacturing and Car Company.
FLAUDRAU, SQUIRES & CUTCHEON,
Solicitors for the Minnesota Thresher Company.

I hereby certify that in my opinion the above demurrer is well founded in point of law.

FRANK B. KELLOGG,
Counsel for Dwight M. Sabin, Joseph C. O'Gorman, and the Northwestern Manufacturing and Car Company.

I hereby certify that in my opinion the above demurrer is
80 well founded in point of law.

FRANK W. M. CUTCHEON,
Counsel for the Minnesota Thresher Company.

UNITED STATES OF AMERICA, } ss:
District Court of Minnesota, }

Joseph C. O'Gorman, one of the above-named defendants, on his own behalf and on behalf of all the other defendants, having been duly sworn, does depose and say that the above-named demurrer is not interposed for delay.

JOSEPH C. O'GORMAN.

Subscribed and sworn to before me this 10th day of *of* April, A. D. 1888.

C. A. SEVERANCE,
[SEAL.] *Notary Public, Ramsey County, Minn.*

(Endorsed:) Filed April 20th, 1888. Oscar B. Hillis, clerk.

81 And afterwards, to wit, on the 27th day of June, 1888, the following further proceedings were had and entered of record in Term Minutes "G," page 785, in the words and figures following, to wit:

Demurrer Argued.

82 Term Minutes, June Term, A. D. 1888, June 27th, 1888.

United States Circuit Court for the District of Minnesota.

HENRY H. PORTER }
vs.
D. M. SABIN *et al.* }

The demurrer of all the defendants herein to the bill of complaint filed in this cause coming on to be heard, the same is argued by

counsel, and the hearing of the same not being concluded at the hour of adjournment, it is ordered that the further hearing of the same be, and it is hereby, postponed until to-morrow morning at 10 o'clock.

83 And afterwards, to wit, on the 28th day of June, 1888, the following further proceedings were had and entered of record in Term Minutes "G," page 787, in the words and figures following, to wit:

Demurrer Argued and Submitted.

84 Term Minutes, June Term, A. D. 1888, June 28th, 1888.

United States Circuit Court for the District of Minnesota.

HENRY H. PORTER
vs.
D. M. SABIN *et al.*

The demurrer of all the defendants coming on to be further heard, the same is further argued by the attorneys for the respective parties, duly submitted, and by the court taken under advisement.

85 And afterwards, to wit, on the 27th day of October, 1888, the following opinion sustaining demurrer was filed in this cause; which said opinion is in the words and figures following, to wit:

Opinion.

86 In the Circuit Court of the United States for the District of Minnesota.

HENRY H. PORTER *et al.*
against
DWIGHT M. SABIN *et al.*

Opinion.

BREWER, C., *J.:*

This case is now submitted on demurrer to an amended and supplemental bill. Complainants are citizens of the State of Illinois and stockholders in the Northwestern Manufacturing and Car Company, and bring this suit in behalf of themselves and all others in like estate. The defendants are all citizens of the State of Minnesota. Two of them, Sabin and O'Gorman, were directors of the car company and had the entire management of its business. While so managing the car company they used its credit by endorsing in its corporate name a large amount of paper for the benefit of third parties, which resulted in great loss to the car,company. These transactions were so carried on as to give an undoubted right of action in favor of the car company against them. On the 10th of May,

1884, the car company failed and one Edward S. Brown was appointed receiver in a suit by the creditors commecned in the State court. The complainants as stockholders applied to such receiver and through him to that court to bring a suit against the defendants Sabin & O'Gorman to ascertain and recover the damages sustained by the corporation by reason of their fraudulent and unauthorized acts, which application was denied. Thereupon this suit was brought by the filing of the original bill, and on the same day the complainants made a motion in that court to be allowed to make the receiver a party defendant; they also subsequently moved
87 to exclude from a contemplated order of sale all causes of action which stockholders might maintain in right of the corporation and which the corporation itself or its receiver had refused to bring, both of which motions were denied, and that court entered an order directing a sale as a whole of the entire assets and plant of the car company, the description in the order being as follows:

"All the stock, property, things in action, and effects of the defendant The Northwestern Manufacturing and Car Company, of which E. S. Brown has been appointed receiver in this action, or to which the receiver may be entitled as the same shall exist at the time of the sale, including all real estate, buildings, machinery, tools, patterns, fixtures, materials, articles manufactured, unmanufactured, or in process of manufacture, cash in hand, book accounts, letters patent, choses in action, bills receivable, and of all property, assets, claims, liens, and demands of every name and nature either in law or in equity and wherever situated."

A public sale was made in pursuance of this order and the property sold to the Minnesota Thresher Manufacturing Company. This sale was confirmed and the property delivered about the 1st of January, 1888. The last-named company, which is made a defendant to this suit, was organized in 1884 for the express purpose of acquiring the property and continuing the business of the car company. During the winter of '86 & 1887 Sabin and O'Gorman obtained the control of the directory and management of the thresher company and for the purpose of preventing an investigation into their management of the car company's business made application to have the car company's assets sold as a whole, which application was successful, and also resisted the application of these complainants to have suit brought in the name of the receiver. To this bill the defendants have, as stated, filed a demurrer, and upon such demurrer the question arises.

It is conceded, and the law undoubtedly is as conceded, that the cause of action stated in the bill is one primarily in favor of
88 the corporation, and that upon the appointment of the receiver such right of action passed to him and he was the party to institute the suit. There can also be no doubt that under some circumstances a cause of action existing in favor of a corporation may be enforced at the suit of a stockholder; but in the view which I take of the case it is unnecessary to consider at large any

of these questions. The pivotal question is whether this suit can be maintained without the presence of the receiver as a party. The authorities all seem to agree that where there is no receivership and a stockholder is seeking to enforce by a suit a right in favor of the corporation the corporation is an indispensable party defendant, and that if for any reason the corporation cannot be made a party defendant the suit must fail. The reason for this is that unless the corporation is a party it is not concluded by the judgment or decree, and the defendant may be subjected to another suit by it and perhaps many suits by the other stockholders, but when the corporation is a party then the judgment or decree binds it, and the defendant is protected from further litigation upon that cause of action.

See Samuels *vs.* Holliday, 1 Woolworth, 400.
Greaves *vs.* Gouge, 69 N. Y., 156.
Brinckerhoff *vs.* Bostwick, 88 N. Y., 52.
Colquitt *vs.* Howard, 11 Georgia, 569.
Insurance Company *vs.* Seabring, 5 Richardson's Eq , 342.
Davenport *vs.* Dows, 18 Wallace, 626.

In the last case the Supreme Court thus disposed of the matter:

"That a stockholder may bring a suit when a corporation refuses is settled in Dodge *vs.* Woolsley, 19 How., 340, but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should
89 be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholders were unsuccessful, to allow the corporation to renew the litigation in another suit involving precisely the same subject-matter. To avoid such a result a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest unless it is made a party to the litigation."

It is not enough to allege and show that the corporation has failed to bring the suit or refused upon demand to bring it; such facts disclose merely the right of the stockholder to maintain the suit.

The same reason makes the receiver also an indispensable party, for as when appointed he has in place of the corporation the right to maintain such an action, if he be not made a party, then the defendant may thereafter be subjected to a suit at his instance. This was recognized in the case of Brinckerhoff *vs.* Bostwick, *supra*, in which the court uses this language:

"The bank was a proper and even a necessary party defendant. It continued to be a corporation notwithstanding the appointment

of a receiver and the receiver may bring actions in its name. The receiver was also a necessary party, as it was through him that the amount which might be adjudged against the directors was to be collected and paid over. The presence of both of these parties was necessary to a final determination of the controversy."

Now, when one is an indispensable party the inability to make him a party does not have the effect to give the court jurisdiction of the action as against the other parties, but prevents it from taking jurisdiction. This is familiar law, and it matters not how this inability arises, whether because that party resides
90 beyond the reach of the process of the court or because through the action of some other tribunal it is impossible to make him a party; that the receiver cannot be made a party without the leave of the court is settled. Barton *vs.* Barbour, 104 U. S., 126. Now, the State court, which appointed the receiver for reasons satisfactory to it and which must be assumed were good and sufficient, not only declined to permit the receiver to sue at the time the application was made to it, but also declined to permit the receiver to be made a party defendant to this suit. Hence no decree can be rendered here binding the receiver, and none which would prevent the receiver from asserting the right of the corporation in a subsequent suit. He is an indispensable party and this court is powerless to make him a party, and therefore the jurisdiction of this court to proceed in this action cannot be sustained.

I have not stopped in this opinion to consider whether the order of sale made of the assets of the car company transferred this right of action to the thresher company. I have assumed that it did not, as claimed by counsel for complainant. It is not expressly mentioned in the order of sale nor is it expressly excluded; the language of that order is general in its terms. If it were such an asset as is assignable, then the general terms of description would probably convey it, and the conveyance, being at a public judicial sale, would doubtless transfer a good title to the purchaser, a title which could not be assailed by these complainants simply as stockholders in the car company.

For these reasons I think the demurrer to the amended bill must be sustained. I have held this case for some time and given the matter much thought, for I was impressed at the argument with the idea that somehow this action ought to be sustained, and only what seemed to me the settled laws of adjudication have forced me to a different conclusion. The demurrer will be sustained.

(Endorsed:) Filed Oct. 27th, 1888. Oscar B. Hillis, clerk.

91 And afterwards, to wit, on the 19th day of November, 1888, pursuant to said opinion, the following order sustaining demurrer was entered in Term Minutes "H," page 91, in the words and figures following, to wit:

Order Sustaining Demurrer.

92 Term Minutes, June Term, 1888, November 19th, A. D. 1888.

United States Circuit Court for the District of Minnesota.

HENRY H. PORTER *et al.*
vs.
DWIGHT M. SABIN *et al.*

The demurrer to the amended and supplemental bill herein having been heretofore fully argued by the solicitors for the respective parties, duly submitted, and by the court taken under advisement:

Now, the court, after due consideration thereof, and being fully advised in the premises, files its written opinion concerning the same.

Pursuant thereto it is ordered and adjudged that said demurrer be, and the same is hereby, sustained.

93 And afterwards, to wit, on the 30th day of January, A. D. 1889, the following decree of dismissal was filed and entered of record in said cause; which said decree is in the words and figures following, to wit:

Decree of Dismissal.

94 United States Circuit Court for the District of Minnesota.

HENRY H. PORTER and RANSOM R. CABLE, Complainants,
vs.
DWIGHT M. SABIN, JOSEPH C. O'GORMAN, THE Northwestern Manufacturing and Car Co., and The Minnesota Thresher Manufacturing Company, Defendants. } In Equity.

This cause came on to be heard at the June term, A. D. 1888, of this court upon the demurrer of all the defendants herein to the amended and supplemental bill and was argued by counsel; and thereupon, upon consideration thereof, it is by the court ordered, adjudged, and decreed that the said complainants' amended and supplemental bill of complaint herein be, and the same is in all things, dismissed, and that the defendant- do have and recover of and from the *defendants* above named or either of them their costs and disbursements herein to be taxed and have execution therefore.

It is further ordered that this decree of dismissal be, and the same is hereby, entered "*nunc pro tunc*" as of January 30th, A. D. 1889.

Dated October 3rd, 1889.

R. R. NELSON, *Judge.*

95 And on the same day, to wit, January 30th, 1889, the bill of costs was filed in this cause in the words and figures following, to wit:

Bill of Costs.

96 United States Circuit Court, District of Minnesota.

H. H. PORTER & R. R. CABLE
against
D. M. SABIN, J. C. O'GORMAN, NORTHWESTERN MANUFACTURING and Car Company, and The Minnesota Thresher Manufacturing Company.

Defendants' costs and disbursements on demurrer.

Docket fee for def'ts Sabin & O'Gorman	$20 00
Docket fee for def't Minnesota Thresher Mnf. Co.	
Printer's fees for Sabin, O'Gorman, & Northwestern Manf. & Car Co.	87 40
Printer's fees, Minn. Thresher Manf. Co.	8 00
Clerk's fees to be taxed	
Costs taxed at	$115 40

OSCAR B. HILLIS, *Clerk.*

STATE OF MINNESOTA, *County of Ramsey,* } ss:

Frank B. Kellogg came personally before me, and, having been first duly sworn, he doth depose and say that he is one of the attorneys of said defendants in the above-entitled cause; that the above bill and items of costs and disbursements therein are just and correct and have been necessarily incurred therein by said defendants.

FRANK B. KELLOGG.

Subscribed and sworn to before me this 24th day of January, A. D. 1889.

C. A. SEVERANCE,
Notary Public, Ramsey Co., Minn.

97 United States Circuit Court, District of Minnesota.

H. H. PORTER & R. R. CABLE
against
D. M. SABIN, J. C. O'GORMAN, NORTHWESTERN MANUFACTURING and Car Company, and The Minnesota Thresher Manufacturing Company.

Notice.

To Messrs. Clapp & Macartney, attorneys for plaintiffs above named.

GENTLEMEN: You will please to take notice that on Wednesday, January 30th, A. D. 1889, at 10 o'clock a. m., the above bill of costs and disbursements will be presented to Oscar B. Hillis, clerk of said

court, for taxation and allowance, and to be included in the judgment then and there to be entered on the demurrer to the complaint heretofore allowed by the court.

St. Paul, Jan. 24th, 1889.

Respectfully yours,

FAYETTE MARSH,
GEO. B. YOUNG, &
DAVIS, KELLOGG & SEVERANCE,
Solicitors for D. M. Sabin, J. C. O'Gorman, & N. W. M'f'g & Car Co.
FLAUDRU, SQUIRES & CUTCHEON,
Solicitors for Minnesota Thresher M'f'g Co.

(Endorsed:) Filed Jan. 30th, 1889. Oscar B. Hillis, clerk.

98 And afterwards, to wit, on the 24th day of June, 1889, a notice of motion for appeal was filed in this cause in the words and figures following, to wit:

Notice of Motion.

99 In the Circuit Court of the United States for the District of Minnesota.

HENRY H. PORTER & RANSOM R. CABLE, Complainants, *vs.* DWIGHT M. SABIN, JOSEPH C. O'GORMAN, THE Northwestern Manufacturing and Car Company, and The Minnesota Thresher Manufacturing Company, Defendants.	In Chancery.

To Fayette Marsh, Davis, Kellogg & Severance, and George B. Young, solicitors for D. M. Sabin, J. C. O'Gorman, and The Northwestern Manufacturing and Car Company, and Messrs. Flandrau, Squires & Cutcheon, solicitors for The Minnesota Thresher Company, defendants:

You are hereby notified that on Monday, the 24th day of June, 1889, on the opening of court on that day, or as soon thereafter as counsel can be heard, at the court-room, in St. Paul, Minnesota, we shall pray an appeal to the Supreme Court of the United States from the final decree heretofore entered against the complainants in favor of the defendants herein dismissing the bill for want of equity, at which time and place you may appear if you see fit.

Dated June 15th, 1889.

CLAPP & MACARTNEY,
Solicitors for Complainants.

J. M. FLOWER,
S. U. PINNEY,
Of Counsel.

(Endorsed:) Filed June 24th, 1889. Oscar B. Hillis, clerk.

100 And on the same day, to wit, June 24th, 1889, the following motion for appeal was filed in this cause; which said motion is in the words and figures following, to wit:

Motion for Appeal.

101 In the Circuit Court of the United States for the District of Minnesota.

HENRY H. PORTER & RANSOM R. CABLE, Complainants, *vs.* DWIGHT M. SABIN, JOSEPH C. O'GORMAN, THE Northwestern Manufacturing & Car Company, and The Minnesota Thresher Manufacturing Company, Defendants.	In Chancery.

Now come the complainants in this cause, by their solicitors, and pray an appeal to the Supreme Court of the United States from the final decree of this court entered herein on the 19th day of November, 1888, and that a citation to the defendants be issued herein returnable according to law.

Dated June 15th, 1889.

CLAPP & MACARTNEY,
Solicitors for Complainants.

J. M. FLOWER,
S. U. PINNEY,
Of Counsel.

(Endorsed:) Filed June 24th, 1889. Oscar B. Hillis, clerk.

102 And on the same day, to wit, June 24th, 1889, the following order allowing appeal was entered of record in Term Minutes "H," page 229, in the words and figures following, to wit:

Order Allowing Appeal.

103 Term Minutes, June Term, A. D. 1889, June 24th, 1889.

United States Circuit Court, District of Minnesota.

HENRY H. PORTER and RANSOM R. CABLE *vs.* DWIGHT M. SABIN and JOSEPH C. O'GORMAN, NORTHWESTERN Manufacturing and Car Company, and The Minnesota Thresher Manufacturing Company.	

This day comes A. E. Macartney, solicitor for complainants, and in open court prays an appeal to the Supreme Court of the United States. Thereupon it is by the court ordered that an appeal be, and the same is hereby, allowed, and that the said complainants file an appeal bond herein, duly approved by this court, in the penal sum of two hundred and fifty dollars ($250).

104 And afterwards, to wit, on the 6th day of July, 1889, the following bond on appeal, duly approved, was filed in this cause in the words and figures following, to wit:

Bond on Appeal.

105 Know all men by these presents that we, Henry H. Porter & Ransom R. Cable, both of the city of Chicago, county of Cook and State of Illinois, as principals, and Amherst H. Wilder, of St. Paul, Minnesota, as security, are held and *fined* bound *with* Dwight M. Sabin, Joseph C. O'Gorman, The Northwestern Manufacturing & Car Company, and The Minnesota Thresher Manufacturing Company, all of the State of Minnesota, in the penal sum of two hundred and fifty dollars ($250.00), lawful money of the United States; for the payment of which to be made, well and truly, we *find* ourselves, our heirs, executors, administrators, and successors, jointly, severally, and firmly by these presents.

Witness our hands and seals this 27th day of June, A. D. 1889.

The conditions of the above obligation is such that whereas in a certain cause then pending in the circuit court of the United States in and for the district of Minnesota, in chancery, wherein Henry H. Porter and Ransom R. Cable were complainants and the said Dwight M. Sabin, Joseph C. O'Gorman, The Northwestern Manufacturing Company, and The Minnesota Thresher Manufacturing Company were defendants, there was made and entered of record in said cause on the 19th day of November, 1888, an order of said cowit dismissing the said bill of complaint of said complainants for want of equity and rendering judgment against the said complainants for the costs of said suit, from which said judgment of the said circuit court the said complainants, Henry H. Porter and Ransom R. Cable, prayed for and obtained an appeal to the Supreme Court of the United States:

Now, therefore, if the said Henry H. Porter and Ransom R. Cable shall duly prosecute their appeal with effect and, moreover, pay the amount of the judgment, costs, and damages rendered and to be rendered against their case *the* said judgment and order shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

HENRY H. PORTER. [SEAL.]
RANSOM R. CABLE. [SEAL.]
AMHERST H. WILDER. [SEAL.]

106 STATE OF MINNESOTA, } ss.:
Ramsey County, }

*I*n this 6th day of July, 1889, before me, a notary public within and for said county, personally appeared Amherst H. Wilder, to me known to be the person described — and — executed the foregoing bond *of* surety, and acknowledged that he executed the same as his free act and deed.

A. E. MACARTNEY,
Notary Public, Minnesota.

STATE of MINNESOTA, } ss:
Ramsey County, }

Amherst H. Wilder, being by me first duly sworn, doth say that he — the surety above-named; that he is a resident and freeholder of the State of Minnesota and worth the amount of five hundred dollars, double the amount specified in the foregoing bond, above his debts and liabilities and exclusive of his property exempt from execution.

AMHERST H. WILDER.

Subscribed and sworn to before me this 6th day of July, 1889.
A. E. MACARTNEY,
Notary Public, Minnesota.

(Endorsed:) Filed July 6th, 1889. Oscar B. Hillis, clerk.

107 And afterwards, to wit, on the 13 day of September, 1889, a citation was filed in this cause; which said citation is as follows, viz:

Citation.

108 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Dwight M. Sabin, Joseph C. O'German, The Northwestern Manufacturing and Car Company, and The Minnesota Thresher Manufacturing Company:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to the appeal filed in the clerk's office of the United States circuit court for the district of Minnesota, wherein Henry H. Porter and Ransom R. Cable are appellants, to show cause, if any there be, why the final decree, dismissing appellants' bill for want of equity, rendered against said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at St. Paul, in said district, this 13th day of September, 1889.

R. R. NELSON, *Judge.*

109 [Endorsed:] Citation. Original. Due and personal service of the within citation is hereby admitted at St. Paul, Minnesota, this 13th day of September, 1889. Davis, Kellogg & Severance, Fayette Marsh, Geo. B. Young, & Flandrin, Squires & Cutcheon, solicitors for all said defendants and appellees. Filed Sept. 13, 1889. Oscar B. Hillis, clerk.

110 UNITED STATES OF AMERICA:

Circuit Court of the United States.

DISTRICT OF MINNESOTA, *ss:*

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 81 pages, numbered consecutively from 1 to 81, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final order, and all other proceedings in said cause and of the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 23rd day of Sept., in the year of our Lord one thousand eight hundred and 89, and of the Independence of the United States the one hundred and 14th year.

Seal U. S. Circuit Court, Dist. of Minnesota.

OSCAR B. HILLIS, *Clerk.*
L. P. RICHARDSON, *Deputy.*

[Endorsed:] United States circuit court, district of Minnesota. Henry H. Porter *et al. vs.* D. M. Sabin *et al.* Return to Supreme Court.

Endorsed on cover: Case No. 13,824. Minnesota C. C. U. S. No. 221. Henry H. Porter and Ransom R. Cable, appellants, *vs.* Dwight M. Sabin, Joseph C. O'Gorman, The Northwestern Manufacturing and Car Company, and The Minnesota Thresher Manufacturing Company. Filed October 18, 1889.

149 U.S. 473

Office Supreme Court U. S.
FILED.
MAR 18 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1892.

Term No. 221.

HENRY H. PORTER AND RANSOM R. CABLE,
Appellants,

vs.

DWIGHT M. SABIN, JOSEPH C. O'GORMAN, THE NORTHWESTERN MANUFACTURING AND CAR COMPANY, AND THE MINNESOTA THRESHER MANUFACTURING COMPANY,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Minnesota.

J. M. FLOWER,
Counsel for Appellants.

HORACE O'DONOGHUE, PRINTER, 192 SOUTH JEFFERSON STREET CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1892.

Term No. 221.

HENRY H. PORTER AND RANSOM R. CABLE,
Appellants,

vs.

DWIGHT M. SABIN, JOSEPH C. O'GORMAN THE NORTHWESTERN MANUFACTURING AND CAR COMPANY, AND THE MINNESOTA THRESHER MANUFACTURING COMPANY,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Minnesota.

This cause comes to this court upon appeal from the decree of the Circuit Court of the United States for the District of Minnesota, dismissing the complainant's amended and supplemental bill of complaint.

The original bill was filed on the 9th day of September, A. D. 1887, against two of the defendants only — Dwight M. Sabin and Joseph C. O'Gorman. The amended and supplemental bill, making two additional parties defendant, was filed on the 7th day of January, A. D. 1888. A demurrer of all the defendants was subsequently filed and sustained by the court, and the suit dismissed.

STATEMENT OF FACTS.

The amended bill sets forth the following facts as the basis for the relief sought:

The complainants are citizens of the State of Illinois, and stockholders in the Northwestern Mannfacturing and Car Company, and bring suit in behalf of themselves and all others in like estate. The defendants are citizens of the State of Minnesota. Two of them, Sabin and O'Gorman, were directors and officers of the car company, and the Minnesota Thresher Manufacturing Company is, in a certain sense, its successor, having purchased its assets, business, plant and good-will.

The Northwestern Manufacturing and Car Company commenced business May 10, 1882, with an authorized capital stock of $5,000,000, of which there was issued at or about that time $3,000,000 of preferred stock and $1,500,000 common stock. Of the stock so issued, the complainant, Henry H. Porter, holds $150,000 in amount, and Ransom R. Cable $37,500. At that time the car company had apparent assets, according to its books, of the value of $4,500,000, and actual assets of which it had possession, or to which it was entitled, of $3,000,000 and owed no debts. On the 10th day of May, 1884, the company failed, and on the same day Edward S. Brown was appointed its receiver, in a creditors' suit commenced and pending in the District Court of Washington County, Minnesota, wherein E. L. Hospes *et al.* were plaintiffs and the car company was defendant, at which time its indebtedness largely exceeded the value of its assets.

During the two years that said corporation was carrying on its manufacturing business and down to the

time of its failure, the defendants, Sabin and O'Gorman, who in their official capacity, as president and treasurer respectively, had the absolute control and management of the finances and credit of the Car Company, in violation of their duty, and without the authority of the corporation and its Board of Directors, and without the knowledge of complainant and other stockholders, issued in large amounts the notes of said corporation for the accommodation of third persons, and also endorsed in the corporate name, the paper of various firms and corporations without consideration, for their benefit, but chiefly for the benefit and accommodation of a corpora tion known as Seymour, Sabin & Company. The transactions, mostly of this character, between these two corporations in the short space of two years amounted to over $12,000,000, and resulted in an admitted loss to the Car Company of over $1,000,000.

Various other unauthorized acts and transactions of like character swell the aggregate loss to about $1,500,000.

The business was so conducted and the books so kept as to cover up and conceal the situation from the knowledge of creditors and stockholders; and the fact that its credit and paper were so used was not known to them until long after the failure, and the extent of the same and the methods used were not fully ascertained unti shortly prior to the commencement of this suit.

Before commencing the same, the complainants applied to the receiver in the Hospes suit, and through him to the District Court of Washington County, for leave to him to bring a suit against the defendants, Sabin and O'Gorman, to ascertain and recover the damages sustained by the Car Company, by reason of their fraudulent and unauthorized acts, which application was denied. There-

upon the original bill was filed for the common benefit of all parties in interest, and thereafter and on the same day the complainants made a motion in the State court to be allowed to make the receiver a party defendant, and also to exclude from a contemplated order of sale all causes of action which stockholders might maintain in right of the corporation, and which the corporation itself, or its receiver, had refused to bring, both of which motions were overruled.

Subsequently the State court entered an order directing a sale, as a whole, of the entire assets and plant of the Car Company, including book accounts, bills receivable, choses in action, etc. A public sale was made in pursuance of the order, which was duly reported to and confirmed by the court; and thereafter, and about the first day of January, 1888, the property and plant were transferred, conveyed and delivered to the purchaser. No description whatever is given in any of the notices, orders or conveyances of the particular right of action covered by this suit. The property was struck off to one Henry D. Hyde, as the agent and trustee of the Minnesota Thresher Manufacturing Company, for the sum of $1,105,000.75, and was conveyed to said Thresher company.

The Minnesota Thresher Manufacturing Company was organized in 1884 for the express purpose of acquiring the assets and liabilities and continuing the business of the Car Company; and it proposed to do this by issuing its preferred stock for the liabilities, and its common stock, dollar for dollar, for the preferred stock of the Car Company, and having done so, to make the assets of the old company the basis for both classes of stock of the new one. Over one-half of the creditors of the Car Company ex-

changed their claims against it for an equal amount of the preferred stock of the Thresher Company, and about one-fifth of the stockholders of the former exchanged their preferred stock for a like amount of the common stock of the latter, prior to September, 1886. In the winter of 1886 and 1887, by the purchase of stock represented by some of the directors and inducements held out to others, Sabin and O'Gorman obtained the control of the directory and management of the Thresher Company, and for the purpose of retaining it, in which they were successful, issued or caused to be issued a large amount of the common stock, and in that manner managed to suppress all investigation which had previously been threatened by the Thresher Company into their official acts as managers of the Car Company. As a part of the scheme for accomplishing that result, and at their instigation and request, the said Thresher Company made application to have the Car Company assets sold as a whole, and sought and attempted to acquire by purchase the right to maintain this action, and opposed the application of the receiver to bring the same and the motion of the complainants to make him a party defendant to this suit after the same had been commenced. The Thresher Company, it is alleged, in that manner became connected with the said Sabin and O'Gorman, and conspired with them to suppress all judicial inquiry into their acts, and further claimed to have purchased and to control this right of action. It is therefore a proper party defendant hereto. As all of the assets of the Car Company have been sold under the order of the State court, so far as the same could legally be sold, and such court has refused to take jurisdiction of the subject matter of this action by suit or otherwise, no question

of conflict of jurisdiction can arise, and we can see no reason why its receiver should be regarded as a necessary party. The Car Company is made a party defendant so that it may be bound by the decree of this court, and the defendants, Sabin and O'Gorman, protected from further litigation.

The bill prays for an accounting by the defendants, Sabin and O'Gorman, and for other relief.

THE DEMURRER.

The defendants demur to the amended bill upon the following grounds :

First—That the Federal Court has no jurisdiction of the matters set forth therein, but that the District Court of Washington County has exclusive jurisdiction in the premises.

Second—That the complainants have not made such a case as entitles them to equitable relief.

Third—That Edward S. Brown, as receiver, is a necessary party to the suit.

The demurrer was sustained by the court below upon the sole ground that the receiver appointed by the State court in the Hospes creditor's suit was an indispensable party to this controversy; that he could not be made a party without the consent of the court which appointed him, and, as such consent had been refused, the suit must be dismissed.

ASSIGNMENT OF ERRORS.

First—The Circuit Court erred in its order sustaining the demurrer to the amended and supplemental bill of complaint.

Second—The Circuit Court erred in its decree dismissing the complainants' amended and supplemental bill of complaint and adjudging costs against the complainants.

BRIEF AND ARGUMENT.

Upon the record and the errors assigned, we submit the following questions of law:

1. Do the facts set forth in the amended bill present an equitable right of action?

2. Does it appear from said bill that the complainants in this suit are entitled to maintain the same?

3. Who are necessary parties defendant to this suit?

4. Has this court jurisdiction of the parties and the subject matter?

5. Is this right of action assignable?

I.

DOES THE AMENDED BILL SET FORTH AN EQUITABLE RIGHT OF ACTION?

It is well settled that the fraudulent or unauthorized acts of the directors or officers of a corporation are injuries to the corporation, to remedy which it is the right and duty of the corporation to bring suit, the same as though such injuries or wrongs were inflicted by third parties.

Cook on Stock, &c., Sect. 644.

It would be a waste of time to cite authorities in support of such a self-evident proposition, and it only remains to be determined, so far as this branch of the case is concerned, whether the corporation itself, were it so inclined

could successfully invoke the aid of a court of equity in an honest effort to recover from its officers, Sabin and O'Gorman, such damages as it has sustained by reason of their fraudulent and unauthorized acts. It appears, from the allegations of the amended bill, that such officers, during the time that they had the control and management of the Car Company, while acting in their official capacity as president and auditor, created and issued a large amount of its commercial paper for the accommodation of third parties, and used its funds and assets for like purposes in very large amounts. That such acts were not only wholly unauthorized and in violation of duty, but were unknown to most of the stockholders, and were covered and concealed by peculiar methods of bookkeeping, and resulted in a loss to the corporation of one and one-half millions, is conceded by the demurrer. The transactions which brought about this condition of affairs were very numerous, and to ascertain and establish the extent of the losses inflicted upon the company thereby, as well as the methods adopted to cover up and conceal the same, involves the examination of very long and complicated accounts. Equity will, unquestionably, take jurisdiction on the ground of fraud, the necessity for an accounting, and because the rights and interests of numerous stockholders, to say nothing of creditors, are at stake, for which there is really no remedy elsewhere.

II.

Are the complainants entitled to maintain this suit?

Clearly the Car Company could do so, unless it had been divested of that right in some legal manner. It seems equally certain that a receiver could maintain such

action as the representative of the corporation, acting under the authority of a court of equity. When and under what circumstances can one or more of the stockholders of a corporation, in right of such corporation, bring such a suit for the common benefit of themselves and other stockholders? In answer to this question we say, that, as to the corporation itself, such right accrues to the stockholder when the corporation refuses to sue, or whenever it is apparent that the parties complained of control the directors and a majority of the stock, so that an application to the corporation to bring suit would be unavailing. In case a receiver has been appointed, so as to vest in him such right of action, the right would accrue to the stockholder after demand made upon the receiver and his refusal to proceed.

No demand was made upon the corporation or its board of directors to bring this suit before the complainants filed their original or amended bill, and under the authorities, and upon the admitted facts set forth in the bill, no demand was necessary.

With two-thirds of the stock of the Car Company held by the Thresher Company, which had resisted every effort put forth to compel the receiver to bring suit, any attempt made by the minority stockholders to have the Car Company sue would be an idle ceremony. Over two-thirds of its stockholders, acting through the Thresher Company, had already decided against it.

An honest effort was made by complainants to prevail upon the receiver to sue, which, under the direction of the court, he refused to do.

If these facts are not sufficient to give complainants the right to sue in the manner and under the circumstances

stated in the amended bill; then there would seem to be a class of injuries for which, in equity, there is no remedy.

It is firmly established law, both in England and America, "that where corporate directors have com-"mitted breaches of trust, either by their frauds, *ultra vires* "acts or negligence, and the corporation is unable or un-"willing to institute a suit to remedy the wrong, a single "stockholder may institute that suit, suing on behalf of "himself and other stockholders and for the benefit of the "corporation, to bring about a redress of the wrong done "directly to the corporation, and indirectly to all stock-"holders."

Cook on Stockholders, Sec. 645.
Atwood v. *Merryweather*, L. R. 5 Eq. 468.
Dodge v. *Woolsey*, 18 How. 331.
Hawes v. *Oakland*, 104 U. S. 450.

As to when a formal demand upon a corporation, or its board of directors, to bring suit, may be dispensed with by the stockholders before commencing suit, the general doctrine seems to be, that when *fraud* and acts *ultra vires* are complained of, and the directory, or a majority of the stockholders, or the management of the corporation, is under the control of the guilty parties, the court will not require that demand should be made upon them to institute an action, in the name of the corporation, to convict themselves of fraud, before the jurisdiction of an equitable tribunal can be invoked by an innocent and injured stockholder.

Hawes v. *Oakland*, 104 U. S. 461.
Tazewell Co. v. *Farmers' L. & T. Co.*, 12 Fed. Rep. 752.
Heath v. *Erie R. Y. Co.*, 8 Blatch. 406.

In the case of *Hawes* v. *Oakland*, *supra*, the court say, where demand is not made, the stockholder must show a case, " where it could not be done, *or it was not reasonable to require it.*"

In *Tazewell Co.* v. *Farmers' Loan & Trust Co.*, *supra*, decided by Judge Harlan, where the county brought suit as a stockholder against its company and others, the point was made, upon demurrer, that the complainant had not sufficient ground to entitle it to bring the suit.

The court say: " In support of this view the court " is referred to *Hawes* v. *Contra Costa Water Co.*, decided " at the last term of the Supreme Court of the United " States. Upon examining the opinion in that case, it " seems that the right of a stockholder to sustain a suit " in his own name upon a cause of action existing in the " corporation itself, will be recognized when the suit relates " to a fraudulent transaction '*completed* or contemplated " by the acting managers, in connection with some other " parties or among themselves, or with the shareholders, " as will result in serious injury to the corporation, or to " the interests of the other shareholders.' After enumerat- " ing other cases, in which the right exists in stockholders " to sue, the Supreme Court says: 'Possibly other cases " may arise, in which, to prevent irremediable injury, or a " total failure of justice, the court would be justified in " exercising its power.' The bill, it is true, does not show " any formal application to the Board of Directors, that " action be taken in the name of the corporation to redress " the wrongs alleged to have been done complainants and " other stockholders. *But it does show a different condi-* " *tion of things touching the control of the corporate affairs* " *by those intrusted with their active management, as*

"*would have rendered such a formal application an idle* "*ceremony.*"

And in *Heath* v. *Erie Ry. Co.*, *supra*, where the act complained of was alleged to be *ultra vires*, and the directors and controlling stockholders parties, Mr. Justice BLATCHFORD held that no demand upon the corporation to bring suit was necessary ; and says, on page 409 :

" The allegations of the bill show satisfactorily that " the company is under the actual potential control of the " defendants, Gould, Fisk and Lane, within the rule of " equity jurisprudence before referred to, so that it would " be a mockery to require or permit a suit against them " to be brought and prosecuted under their management, " to obtain the relief sought by this bill. (*March* v. *East-* " *ern R. R. Co.*, 40 N. H. 548. *Robinson* v. *Smith*, 3 " Paige, 222.)"

No demand was necessary except upon the receiver, who, at the time the same was made, was the representative of the corporation, and the only person then qualified to maintain this suit. With his appointment all corporate rights of action passed to him, and he could institute suits therein, either in the corporate name or in his own as receiver. Application having been made to him to bring this suit and he having refused, the right to maintain the same accrued at once to the complainants to the same extent and in like manner as it would have done had there been no receiver, and a like demand, followed by a refusal, had been made upon the corporation itself.

We think these views are fully supported by the following authorities:

Ackerman v. *Halsey*, 37 N. J. Eq. 356.
Chester v. *Halliard*, 34 N. J. Eq. 341.
Fisher v. *Andrews*, 37 Hun. (N. Y.) 176.
Brinkerhoff v. *Bostwick*, 88 N. Y. 52.

In the case of *Ackerman* v. *Halsey*, *supra*, the bill was filed by a creditor and stockholder of the Mechanics' National Bank, on behalf of himself and others, against the president, directors and receiver of said bank, and set forth various acts of negligence upon the part of the president and directors, by reason of which its assets were squandered and misappropriated, loans made to insolvents, its books falsified, and its entire capital lost, and a large indebtedness created in excess of its assets. The receiver was appointed by the Comptroller of the Currency, and was in possession of the assets. Demand was made upon him to commence suit and prosecute proceedings against the president and directors, to recover from them the damages sustained by the bank and its stockholders by reason of their neglect and official misconduct, but he refused to do so.

All of the defendants filed demurrers, and the following questions were presented, whether the court had jurisdiction of the case, and whether the allegations of the bill were sufficient to entitle the complainant to relief.

The court, in its opinion, says: "That the subject of "this litigation is within the jurisdiction of this court will "admit of no question. The suit is brought by a cred- "itor and stockholder against the directors, to obtain "redress for the waste of the entire capital and surplus of "the bank, whereby he has been subjected to loss as a "creditor of the bank, and has, as a stockholder, lost not

" only his stock, but also a sum of money equal to its par " value. The ground of the claim is that the directors " utterly neglected to discharge any of the duties of their " office. For such a wrong there is a remedy in equity. " For any willful breach of their trust, or misapplication " of the corporate funds, or for any gross neglect of or " inattention to their official duties, directors are person- " ally liable in this court. (Cases cited.) And the liability " is to the corporation in the first instance, where the cor- " poration is capable of acting; but if it refuses to do so, " then a person aggrieved may bring the suit. If the " corporation be insolvent and its affairs in the hands of a " receiver, he may maintain the litigation. If he refuses " or is himself involved, a person aggrieved may sue. " *Chester* v. *Halliard*, 7 Stew. Eq. 341; *Brinkerhoff* v. " *Bostwick*, 88 N. Y. 52. That is to say, primarily the " corporation, or if insolvent, its representative, must " sue; but, in case of their disability or refusal, a person " aggrieved may bring the suit, making the corporation, " or its representative, a defendant. Here the corporation " is insolvent, and there is a receiver. Under the national " banking law he would have been the proper person to " bring the suit, if he would. He, however, refuses to " do so."

In the case of *Brinkerhoff* v. *Bostwick et al.*, the court decided as follows:

" The directors of a corporation, if, through gross " negligence and inattention to the duties of their trust, " they suffer the corporate funds to be lost or wasted, are " liable for the loss so sustained.

" An action may be brought by a receiver of a national " bank against directors to recover damages so sustained,

"at least when no proceeding is pending under the "National Bank act for the forfeiture of its charter.

"In case the receiver is one of the directors charge- "able with neglect of duty, such action may be maintained "by the stockholders, and, when the stockholders are "numerous, the action may be brought by one or more in "behalf of all.

"It is not necessary to allege in the complaint in such "an action a direction from the comptroller, or a demand "upon him, and a refusal to direct the receiver to bring "the action, or a refusal of the receiver to sue. Such an "action may be brought in the State court."

Upon the allegations in the amended bill, and under the authorities cited, it seems perfectly clear that the complainants are entitled to maintain this suit. Demand was made upon the receiver to institute the same, at a time when it was both his right and duty to do so, and he refused. If, under different circumstances, a like demand upon the corporation itself would have been necessary, it is not required under the existing facts, because of the hostile attitude of a majority of the stockholders, and of the fact that the corporate affairs are controlled by the officers whose fraudulent acts are complained of.

III.

Who are necessary parties defendant to this suit?

We say:

1. The officers who are complained of, and through whom and by whose fraudulent acts the losses and injuries which arose therefrom were inflicted upon the corporation and its stockholders.

2. The corporation itself, whose property was wasted, squandered and misappropriated, and to which the delinquent officers owed a duty, and in right of and for the benefit of which this suit is brought.

3. The Minnesota Thresher Manufacturing Company, which claims to have acquired by purchase at judicial sale the right of the Car Company to maintain this action against its officers to recover damages for fraud and negligence.

Aside from the persons and corporations above named, we know of no others who are indispensable parties to this suit. At the time of the filing of the original bill herein it was intended that E. S Brown, the receiver of the Car Company, should be made a defendant. Application was made to the State court appointing him for permission to do so, which was refused. Since that time, the court has attempted to sell the right of action involved in this suit, so that either by its refusal to permit its receiver to sue or be sued, or by attempted sale, the State court has lost all jurisdiction of the subject matter thereof, and all right to distribute through its receiver, or otherwise, any moneys that may be recovered herein.

The demurrer to the amended bill was sustained in the court below on the sole ground that the receiver is an indispensable party to this suit, upon the authority of *Brinkerhoff* v. *Bostwick*, 88 N. Y. 52. The language of the court in that case, as quoted by Mr. Justice BREWER, in his opinion, is as follows:

"The bank was a proper and even a necessary party "defendant. It continued to be a corporation notwith- "standing the appointment of a receiver, and the receiver "may bring actions in its name. The receiver was also a necessary party, as it was through him that the

"amount which might be adjudged against the directors "was to be collected and paid over. The presence of "both of these parties was necessary to a final determina- "tion of the controversy."

If the presence of the receiver appointed by the State court is necessary in this case, in the sense that he is an indispensable party—that is to say, if by that term it is meant that it is beyond the power of the United States court in his absence, to make an equitable distribution of the fund which may be realized, or to protect the delinquent officers against further litigation—then it may be conceded that there is no escape from the conclusion reached, because it is not in the power of the complainants to make Receiver Brown a party.

If, on the other hand, it is within the power of the United States Circuit Court to distribute the fund, if one should be realized, through its own receiver; if the State court and its receiver, by refusing to sue when it might do so, and by its attempted sale, has abandoned its jurisdiction of this right of action, and all control over it, then the State receiver, although his presence might be a convenience, is not an indispensable party.

In the Brinkerhoff case the receiver was held to be a necessary party, because through him "the amount which "might be adjudged against the directors was to be col- "lected and paid over," and not because it was essential in order to protect the directors against further litigation. The suit by the complainants is not a private suit. It is just as much in right of the corporation and for its benefit as though it had been brought by the receiver. The United States Circuit Court can by its decree control the application of the recovery and so bind the corporation itself, and thereby protect the delinquent officers from

further litigation. Unless this can be done, all remedy fails, because of a mere discretionary order of the court in the insolvency case. The circumstances surrounding this case are so exceptional in their character that no settled law of adjudication ought to be arbitrarily applied, if it be within the legitimate exercise of the powers of the court to create an exceptional rule which, while protecting the delinquent parties in the enjoyment of all their legal rights and providing for an equitable distribution of the fund, shall afford ample opportunity for a judicial investigation and determination of the fraudulent acts complained of.

IV.

HAS THIS COURT JURISDICTION OF THE SUBJECT MATTER OF THIS SUIT?

The answer to this question must clearly be in the affirmative, unless some other court has previously acquired and still retains jurisdiction of the cause; so that, if this court were to assume jurisdiction, there would be a conflict between the two courts. In our view of the case, the District Court of the County of Washington, when it entered its order refusing permission to its receiver to sue, lost all control over this right of action, and any stockholder or other person in privity with the corporation became at once entitled to bring suit in any forum that he might select having jurisdiction of the parties. No power ever existed in that court, or any other, to sell or transfer the same; it was a mere naked, intangible right to file a bill in equity, which all courts everywhere have held is not a vendible commodity and is not assignable. It is not

even a chose in action in the ordinary sense of that term. It is in no manner connected with tangible property; it does not exist in the form of indebtedness, nor arise upon contract; it arises solely from the fraud or negligence of the officers, which resulted in a loss to the corporation.

From the authorities already cited by us, it satisfactorily appears that, where the receiver of an insolvent corporation has refused to briug such a suit as this, a stockholder has the undoubted right to do so. After the stockholder has exercised that right, can the receiver, though acting under the direction of a court of equity, divest him of it by a sale thereof? It is true that the State court might, through its receiver, have enforced it for the benefit of the Car Company, its creditors and stockholders, if it had seen fit to do so, but it could only do so by suit. It was such an intangible right that it could only be reduced to possession by the commencement of an action. The party first instituting the proceeding, having at the time the legal right to do so, is in possession, and is entitled to prosecute it to the end, and cannot be interferred with or dispossessed by any subsequent act or proceeding, either by the corporation itself or by a court which has instructed its receiver not to sue.

The rule would be different, undoubtedly, if the State court could sell and transfer to a purchaser this right of action. If it could not be sold, and the court refuses to permit it to be sued by its receiver, it is difficult to perceive how it could have any further control over it, or take any further action in relation to it. Unless the effect of these proceedings in the State court be to absolutely destroy the right of action, it necessarily follows that it still remains in the corporation and can only be prosecuted

by it, or by its stockholders in its right. The jurisdiction of the United States Court is just as absolute and complete as to this right of action, as though no suit had ever been commenced in the State court and no receiver had ever been appointed, or as though the creditor's suit had been ended and the receiver discharged before this suit was commenced, leaving this right of action undisturbed.

V.

Is this right of action assignable?

Upon the subject of the non-assignability of this class of actions the law seems to be well settled, and the authorities numerous and in point.

The general doctrine is as follows: "An assignment "of a bare right to file a bill in equity for a fraud com- "mitted on the assignor will be held void, as contrary to "public policy and as savoring of the character of main- "tenance; so a mere right of action for a tort is not, "for the like reason, assignable. Indeed, it has been "laid down as a general rule that, where an equitable "interest is assigned, in order to give the assignee a *locus* "*standi in judicio* in a court of equity, the party assign- "ing such right must have *some substantial possession* and "some capability of personal enjoyment, *and not a mere* "*naked right to overset a legal instrument or to maintain* "*a suit.*"

2 Story's Eq. Juris., sec. 1040 g.

2 Spence's Eq., sec. 868.

Prosser v. *Edmonds*, 1 Younge & Coll. 481, 496–99.

M. & M. Ry. Co. v. *M. & W. Ry. Co.*, 20 Wis. 174, 183.
McMahon v. *Allen*, 34 Barb. 50, 56.
Morrison v. *Deaderick*, 10 Humph. 342.
Marshall v. *Means*, 12 Ga. 61.
Price v. *Price*, 75 N. Y. 244.
Bulliard v. *Raynor*, 30 N. Y. 197.
Norton v. *Tuttle*, 60 Ill. 130.
Crocker v. *Bellanger*, 6 Wis. 645.
Smith v. *Harris*, 33 Mo. 577.
Hammond v. *Peyton*, 34 Minn. 529.
Jones v. *Babcock*, 15 Mo. App. 149.
Ely v. *Hergesell*, 46 Mich. 325.
Brush v. *Sweet*, 38 Mich. 574.
Pillsbury v. *Mitchell*, 5 Wis. 17.
Elder v. *Jones*, 85 Ill. 384.
Olney v. *Tanner*, 21 Blatch. 540.
Dayton v. *Fargo*, 44 Mich. 624.
Tufts v. *Matthews*, 10 Fed. Rep. 609.
Ware v. *Brown*, 2 Bond, 269.

The leading case upon this subject is *Prosser* v. *Edmonds*, 1 Younge & Coll. 481. The doctrine contended for by us is discussed at great length by Lord ABINGER, and sustains our position.

He says: "With respect to the question as to the "validity of an assignment of a right to file a bill in equity, "*I must distinguish between this sort of case and the* "*assignment of a chose in action* or equity of redemption. "It may be said that the assignment of a mortgaged "estate is nothing more than an assignment of a right to "file a bill in equity. But the equity of redemption "arises out of an interest, though only a partial interest.

" Courts of law and equity treat the mortgage as a mere
" security, and there is an interest left in the mortgagor,
" which he may assign. But, in a case where a party
" assigns his whole estate, and afterwards makes an assign-
" ment, generally of the same estate, to another person,
" and the second assignee claims to set aside the first
" assignment as fraudulent and void, the assignor himself
" making no complaint of fraud whatever, it appears to
" me that the right of the second assignee to make such a
" claim would be a question deserving of great considera-
" tion. My present impression is such a claim could not
" be sustained in equity, unless the party who made the
" assignment joined in the prayer to set it aside. In
" such a case a second assignment is merely that
" of a right to file a bill in equity for a fraud,
" and I should say that some authority is necessary to
" show that a man can assign to another a right to file a
" bill for a fraud committed upon himself. The remaining
" cause of a demurrer, namely, that the plaintiffs have no
" right to equitable relief, raises an important and curious
" question, which is this: Whether or not parties who
" either become purchasers for a valuable consideration,
" or who take an assignment in trust of a mere naked right
" to file a bill in equity, shall be entitled to become plaint-
" iffs in equity in respect of the title so acquired. Now,
" in the course of the argument it was urged that an equi-
" table as well as a legal interest may be the subject of a
" conveyance, and that the assignee of a chose in action
" may file a bill in equity to recover it, although he cannot
" proceed at law for that purpose. But, where an equi-
" table interest is assigned, it appears to me that, in order
" to give the assignee a *locus standi* in a court of equity,
" the party assigning the right must have some sub-

" stantial possession, some capability of personal enjoy-
" ment, and not a mere naked right to overset a legal
" instrument. For instance, that a mortgagor who
" conveys his estate in fee to a mortgagee has in himself
" an equitable right to compel a re-conveyance when the
" mortgage money is paid, is true. But that is a right
" reserved to himself by the original security; it is a right
" coupled with possession and receipt of rent, and he is
" protected so long as the interest is paid, and it does not
" follow that the assignee of the mortgage and the mort-
" gagee may not adjust their rights without the interven-
" tion of a court of equity. In the present case it is im-
" possible that the assignee can obtain any benefit from
" his security, except through the medium of the court.
" He purchases nothing but a hostile right to bring parties
" into a court of equity as defendants to a bill filed for the
" purpose of obtaining the fruits of his purchase. So,
" where a person takes an assignment of a bond, he has
" the possession, and, although a court of equity will per-
" mit him to file on the bond, it does not follow that he is
" obliged to go into a court of equity to enforce payment
" of it. So other cases might be stated to show that,
" where equity recognizes the assignment of an equitable
" interest, it is such an interest as is recognized also by
" third persons, and not merely by the party insisting on
" them. What is this but the purchase of a mere right to
" recover ?

" It has been the opinion of some learned persons
" that the old rule of law, that a chose in action is not
" assignable, was founded on the principle of the law not
" permitting a sale of a right to litigate. That opinion is
" to be met with in Sir William Blackstone and the earlier
" reporters. Courts of equity, it is true, have relaxed

" that rule, but only in the cases which I have mentioned, " where something more than a mere right to litigate has " been assigned. Where a valuable consideration has " passed, and the party is put in possession of that which " he might acquire without litigation, there courts of " equity will allow the assignee to stand in the right of " assignor. This is not that case. Robert Todd, when " he assigned, was in possession of nothing but a mere " naked right. He could obtain nothing without filing a " bill. No case can be found which decides that such a " right can be the subject of assignment, either at law or " in equity."

In the case of *The Mil. and Minn. R. R. Co.* v. *The Mil. and Western R. R. Co. et. al.*, 20 Wis. 174, the court holds, that " a right of action to set aside a release " from the obligation of a covenant, on the ground that " such release was fraudulently procured, cannot be " assigned."

The court, in its opinion, says: " Admitting that the " facts there alleged present a case which would entitle the " La Crosse and Milwaukee company to have the release set " aside on account of these acts of fraudulent concealment, " by one of its directors, of his interest in the defendant " company, and assuming that the further fact appears " that this right of action has been assigned by the La " Crosse and Milwaukee company to the plaintiff, the ques- " tion would then arise, whether the release could be " avoided on the application of such plaintiff, the La " Crosse and Milwaukee company making no complaint of " the fraud whatever. In other words, is this mere right " to litigate the question, and to set aside the deed of re- " lease on account of fraud practiced upon the assignor, " a subject of assignment and transfer? And will a court of

" equity allow the assignee to stand in the shoes of the " assignor in respect to the remedies? On the part of the " counsel for the appellants, it is insisted, that, in whatever " light these matters in the complaint are viewed, whether " Nixon be charged with actual or constructive fraud, at " most they merely show a right of action in the " La Crosse and Milwaukee Company, one which could be " asserted or not, at its option, but by no one else claiming " as assignee or guarantee; and that the principle was so " decided in the case of *Crocker* v. *Bellanger*, 6 Wis. 645. " In that case Bellanger was alleged to have imposed " upon and defrauded one Casey in obtaining a conveyance " of land. Crocker, as Casey's subsequent guarantee, sought " to avoid the former conveyance for the fraud perpetrated " upon the grantor; and it was held by this court that the " bill could not be maintained. In *Prosser* v. *Edmonds*, " 1 Younge & Coll., 481. will be found a very interesting " and satisfactory discussion of the question, whether the " right to file a bill to set aside a legal instrument for " fraud committed upon the assignor is assignable; and it " is held that it is not. A reference to these authorities is " all which probably need be said at this time in regard to " the allegations above cited, and upon the point whether " the plaintiff company could avoid a release for the alleged " fraudulent act of concealment of Nixon, even if this right " of action had been assigned to it by the La Crosse and " Milwaukee Company."

This doctrine is fully supported by the decision of the Supreme Court of New York in the case of *McMahon* v. *Allen*, 34 Barb. 56.

It is there held:

" One who has conveyed real estate to another, by " deed, and who has a right of action against the grantee

"to have the conveyance declared void and set aside on "the ground of fraud, undue influence, inadequacy of "price, etc., cannot, without possession and without any "present estate or interest, assign such right of action to "another, so as to enable the assignee to bring an action "in his own name, to set aside the conveyance."

"A mere personal right to avoid a deed on the "ground that the grantor has been defrauded, cannot be "called a chose in action, within the most extended defi- "nition of that phrase."

"The plaintiff's cause of action, if he has any, must "be considered to be a right to have the conveyance from "Charles T. Harrison to the defendant set aside as fraud- "ulent and void; for the other and further relief asked for "is asked for and can only be granted as incident to, or "following from, the principal or main relief; which is to "have the conveyance set aside, so that the plaintiff can "have the reconveyance and other relief asked for.

"Assuming that the deed was fraudulently obtained "by the defendant from Charles T. Harrison, or obtained "under circumstances which would authorize a court of "equity to declare it void, yet it was not void, but voida- "ble, when Charles T. Harrison made his assignment or "conveyance to the plaintiff, and must remain voidable "until so declared to be void. (Cases cited.) A *bona fide* "purchaser from the defendant without notice would have "acquired a good title. (Cases cited.) Charles T. Har- "rison, then, at the time of his assignment or conveyance "to the plaintiff, had neither the possession of, nor any "estate or interest in, the property or things he had con- "veyed or released to the defendant, but only a naked "right of action to have his conveyance to the defendant "declared void, so that he could be reinvested with his

"former rights and interests. Could he, without posses-
"sion and without any present estate or interest, assign
"his mere right to have his conveyance to the defendant
"declared void? That is the question.

"I do not think that Charles T. Harrison's personal
"right to avoid his deed to the defendant on the ground
"that *he* had been defrauded can be called a chose in action
"within the most extended definition of that phrase. To
"say that the plaintiff is the party in interest, and there-
"fore can bring the action in his own name, is assuming
"the very thing in question. If the deed from Charles
"T. Harrison to the defendant was voidable merely, not
"void, then Charles T. Harrison had no interest to assign
"to the plaintiff, and the question is, whether he could
"assign to the plaintiff his right to avoid the conveyance
"for fraud, so that he might have an interest which might
"pass to the plaintiff under the conveyance or assignment
"to the plaintiff.

"It may be conceded that the right to avoid a con-
"veyance of real estate or a contract as to personalty,
"for fraud, would survive to the heir, devisee or executor
"of the party defrauded; but I do not see that the fact of
"such involuntary transfer or right of survivorship by
"force of the law can have much weight on the question
"of voluntary assignability in this case.

"Upon the whole, I am of the opinion that Charles
"T. Harrison could not assign to the plaintiff the right
"to bring this action in his own name, and that the judg-
"ment below should be reversed and a new trial ordered,
"with costs to abide the event."

In *Jones* v. *Babcock*, 15 Mo. App. R., p. 149, the court held that: "A naked right to bring an action in "equity to set aside a foreclosure, under a deed of trust,

" on the ground of fraud on the part of the trustee, is not " assignable.

" The case charged, in substance, is that Frances J. " Jones and Richard S. Jones, her husband, had made " certain conveyances in trust to the defendant, Leicester " Babcock, to secure certain debts; that Babcock, in 1874, " secretly purchased the notes thereby secured, advertised " the property for sale and sold the same, as trustee, and " caused it to be bid in in the name of the *cestui que trust*, " but really for himself; that this fraud was not discovered " until March, 1880; and that, in May, 1880, Frances J. " Jones and Richard S. Jones conveyed, by quit-claim " deed, their right, title and interest in the premises thus " sold under these deeds of trust, to this plaintiff.

" What did this quit-claim deed convey to this " plaintiff beyond the bare right to prosecute a suit in " equity, to set aside a trustee's sale, on the ground of " fraud? That was all the grantors had to convey; and, " while they could have asserted such a right themselves, " they could not assign it to another. It is different from " the case where a party is out of possession, and another " party in possession, under a deed which is wholly void, " as a deed of a married woman which has not been " properly acknowledged. Here no title has passed; but " the trustee's sale in question was not void in the sense " that no title passed to the purchaser; it was merely " voidable at the election of the parties prejudiced " thereby, in case they should seasonably invoke the aid " of a court of equity to that end."

The same doctrine is again asserted in the case of *Norton* v. *Tuttle et al.*, 60 Ill. 130, where an attorney in fact claimed the right under an alleged irrevocable power of attorney to control a suit brought by Norton, the com-

plainant, against the defendant therein, to set aside an alleged fraudulent sale made by Tuttle, as guardian, and for an accounting. The court held that such a claim was not assignable, and conceding that there was an existing indebtedness against and a valid power from Norton to his attorney, Camp, the latter had no right to carry on the prosecution of the suit against the will of Norton.

SHELDON, J.: "Within the principle of the authorities "cited, we must regard the subject matter of the contro- "versy in this suit as not assignable, and that any attempted "assignment of it should be held void as contrary to good "policy.

"If not assignable, then Camp could acquire no "interest in it by way of security for any indebtedness of "Norton to him, and there would be nothing upon which "he could found the claim of an irrevocable power of "attorney, entitling him to take from Norton the control "of the suit, and to persist in its prosecution in the name "of the latter against his will, and in the face of his sworn "statement placed upon the record, that he has no claim "whatever against Tuttle.

"The position of Camp is less favorable than if he "were an assignee of the subject of the suit.

"Nothing has been assigned to him, but he has merely "a power of attorney to prosecute this litigation, and, out "of the fruits of it, to reimburse himself for his expenses, "and repay an indebtedness to him, as recited in the "power, with no mention of its amount."

In *Ware* v. *Brown*, 2 Bond (U. S. C. C.), 269, the court held that:

"A right of action for a tort is not assignable by "operation of law or otherwise, and an action for dam- "ages resulting from a tort can only be sustained by a

" person directly injured thereby, and not by one alleging " a collateral or resulting injury.

" No right of action exists against a notary public for " an alleged official malfeasance, in corruptly and falsely " certifying to the execution and acknowledgment of an " assignment of an interest in real estate in favor of a pur- " chaser under such fraudulent assignment for damages, " resulting from his defective title, arising from the mal- " feasance of the notary public.

" The redress for the malfeasance of the notary can " only be obtained by the person to whom the fraudulent " assignment was made, and whose title was thereby inval- " idated."

The court say:

" The fraud and malfeasance of the defendants, if the " facts averred in the declaration are true, undoubtedly " show the most repulsive official corruption on the part " of this defendant.

" And if this action was prosecuted by Buffington, " who was the person directly defrauded by the acts " alleged against the defendant in his official capacity as a " notary public, there would be no question that it would " be sustained, and that he could recover to the extent of " any loss or injury he may have suffered. But it is a " very different question whether this plaintiff has a right " of action.

" The general principle is, that no one but the party " directly injured by the commission of a tort, can sue for " the injury arising from it. It is well settled that a right " to compensation for a wrong committed, is not assign- " able in fact or by operation of law. 1 Peters, 193. " There was no privity between this plaintiff and the " parties implicated in the fraudulent acts alleged. He

" then had no interest in the property, and there could " have been no intention to defraud or injure him. The " alleged fraud was in the sale and conveyance to Buffing- " ton, and the false authentication of the assignment to " him.

" The case of *Dehn* v *Heckman*, 12 Ohio St. R. 181, " seems to sustain the principle suggested, that the person " directly injured by a tortuous act *or a wrongful neglect* " of official duty, only has a right of action. In that case " a justice of the peace was sued for not having issued " process, and entered judgment against the maker of a " promissory note left with him for collection. An in- " dorser paid the note and brought suit against the justice " for neglect of duty. The court held that the owner or " holder of the note had the legal right of action against " the justice, and that the action by the endorser could " not be sustained."

See, also, *Wells* v. *Cook*, 16 Ohio St. 67.

The Supreme Court of Minnesota has decided, in *Hammond* v. *Peyton, assignee*, 34 Minn. 529, that the equitable lien of a grantor of real estate for the price thereof is not assignable.

The court say (page 532): " While there is in this " country a diversity of opinion in most of the States, the " lien is held to be personal to the grantor, and not " assignable ; and it would, of course, follow that in those " States the transfer of the debt, either with or without an " assignment of the lien, would not pass the lien to the " transferee. * * * We, therefore, hold that a grant- " or's lien is not generally assignable. We are not, how- " ever, to be understood as holding that it may not descend " to the grantor's representatives, nor that it may not pass

" to his assignee for the benefit of creditors, nor that there " may not be some other cases in which it may pass to " some person who may be regarded as merely represent- " ing the grantor and his interest, and not as acting simply " for himself."

To the same effect in the case of *Keith et al.* v. *Horner*, 32 Ills. 526, in which the court say: " This court " has held that the law does not authorize the assignment " or transfer of a vendor's lien to the purchaser of the " notes given for the purchase money; that such lien is not " assignable even by express language; that the lien is " personal, and can only be enforced by the vendor. " *Richards* v. *Leaming*, 27 Ills. 431. This lien would no " doubt pass, on the death of the vendor, to his represent- " atives, but it is not the subject matter of sale and trans- " fer by contract."

This case is followed, and the same doctrine asserted by the same court, in *Elder* v. *Jones*, 85 Ills. 384.

To the same effect is *Hecht* v. *Spears*, 27 Ark. 229.

The right to prosecute an action to recover damages for deceit has frequently been held non-assignable.

The case of *Tufts* v. *Andrews*, 10 Fed. Rep. 609, is directly in point. The facts were as follows: The assignee of a bankrupt sold all the assets of the estate remaining in his hands, and the purchaser again sold and transferred them to the complainant, Tufts, who commenced an action against the defendants for pecuniary damages arising from alleged false representations made to the bankrupt and to his assigns, through which certain railroad bonds held as security for certain notes were given up. The defendants demurred to the declaration, and the main question raised thereby was whether an action for deceit was assignable. We quote from the

opinion, COLT, D. J. : "The action before us is one for "pecuniary damages arising from alleged false representa- "tions made to the bankrupt and to his assignees, through "which the bonds deposited as security for the payment "of the notes of one of the defendants were given up. "So far as it may be contended that the plaintiff has "succeeded to any right of action that the bankrupt "may have had, it is clear, we think, that this chose "in action did not pass to the assignee, and there- "fore did not pass to him; and, so far as it may be "claimed that this is a right of action that accrued to the "assignees personally, we fail to discover any authority in "the bankrupt act, or otherwise, for them to assign an "action of this character. The right to complain of a "fraud is not a merchantable commodity, say the court in "*De Houghton* v. *Money*, L. R. 2 Ch. App. 164."

Dickinson v. *Seaver*, 44 Mich. C. 24, also holds that an action for fraud is not assignable.

Numerous other decisions are to be found in the books bearing more or less directly upon the subject under discussion.

In South Carolina, it has been decided that a chose in action arising out of a personal tort, like slander, is unassignable; it continues such pending appeal, and until final judgment.

Miller v. *Newell*, 20 S. C. 122.

In Michigan, that the grantee in a deed containing covenants of warranty cannot sever his right of action thereon, and assign it to another person, while he keeps the premises himself.

Ely v. *Hergesell*, 4 C. Mich. 325.

In Massachusetts and Wisconsin, that a breach of covenant against incumbrances is a chose in action, and not assignable.

Clark v. *Swift*, 3 Met. 390.
Pillsbury v. *Mitchell*, 5 Wis. 17.

And, in New York, that rights of action for breach of promise, or to avoid usurious notes, are not assignable.

Price v. *Price*, 75 N. Y. 244.
Bulliard v. *Raynor*, 30 N. Y. 179.

It is needless to multiply authorities upon this subject.

In conclusion we respectfully submit that the decree of the Circuit Court should be reversed and the cause remanded.

J. M. FLOWER,
Counsel for Appellants.

921 149 U.S. 473

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IN THE

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1892.

HENRY H. PORTER AND RANSOM R. CABLE,
Plaintiffs in Error,

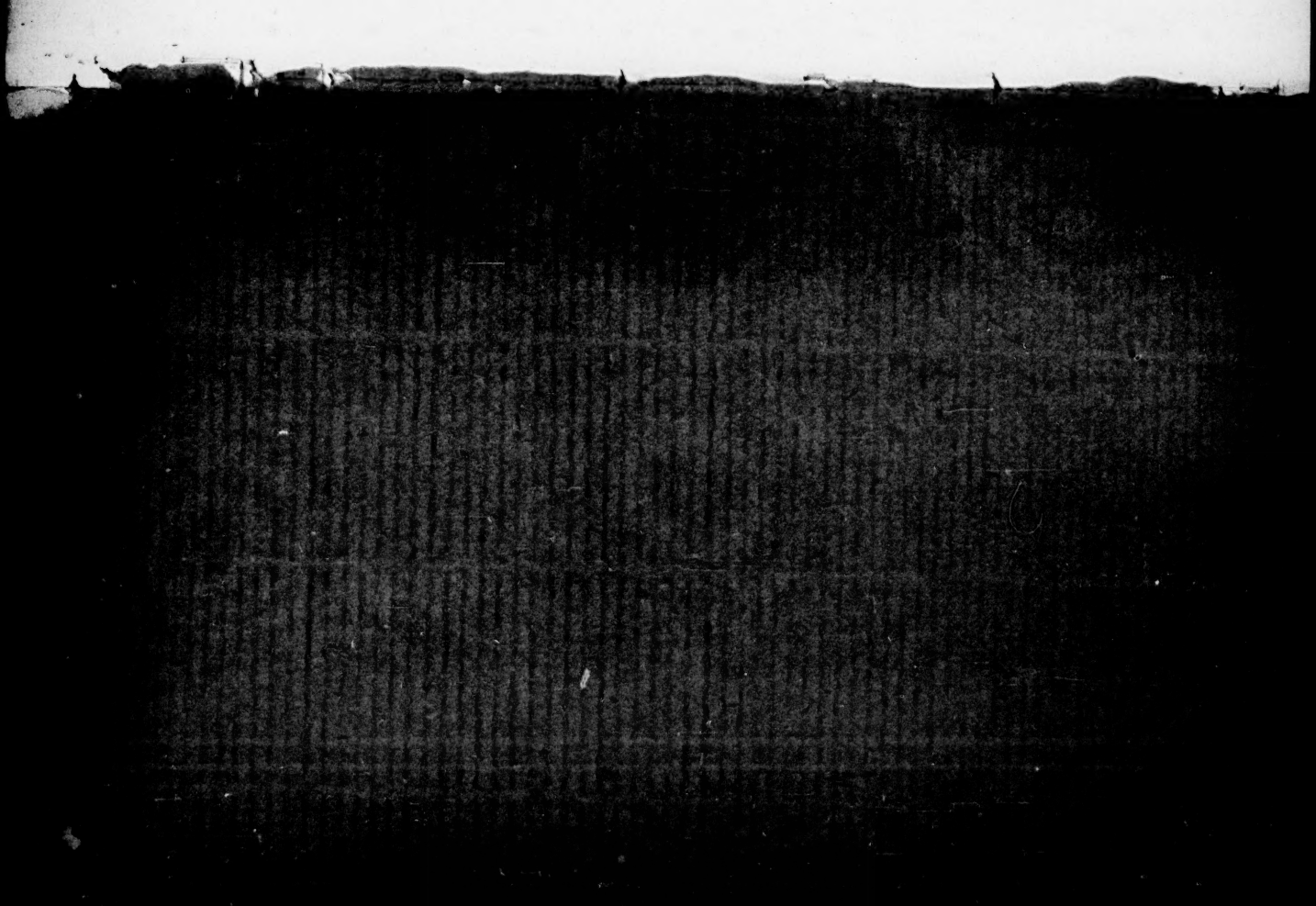
vs.

DWIGHT M. SABIN AND J. C. O'GORMAN, ET AL.,
Defendants in Error.

DEFENDANT'S BRIEF

FRANK B. KELLOGG, AND
DAVIS, KELLOGG & SEVERANCE,
Defendants' Counsel.

FRANK B. KELLOGG,
Of Counsel.



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vs.
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Defendants in Error.

SUMMARY OF THE ALLEGATIONS CONTAINED IN THE COMPLAINANTS' AMENDED BILL.

That the Northwestern Manufacturing and Car Company was a corporation organized under the laws of the state of Minnesota in the year 1882. And that said corporation was placed in the hands of a receiver on the tenth day of May, 1884, in a proceeding duly instituted in the district court of Washington county, Minnesota, and is still in the hands of such receiver. That during the period of its existence and business career, Dwight M. Sabin, one of the defendants named in the bill, was president, and J. C. O'Gorman, the other defendant named in said bill, was the auditor and

treasurer of said corporation. And that during all of said time the complainants were stockholders of said corporation.

That Seymour, Sabin & Co., was during said time a corporation duly organized under the laws of the state of Minnesota. That said corporation was on the tenth day of May, 1884, placed in the hands of a receiver in a certain proceeding duly commenced and pending in the district court of Washington county, Minnesota. That from 1882 to 1884, the said corporation of Seymour, Sabin & Co., was largely controlled by the defendants, Dwight M. Sabin and J. C. O'Gorman. That said corporation is still in the hands of a receiver, and is wholly insolvent.

That during the same period, to-wit: from 1882 to May, 1884, the Union Depot Street Railway and Transfer Company of Stillwater, was a corporation doing business at Stillwater, and under the control of the defendants, Dwight M. Sabin and J. C. O'Gorman. And that said corporation is now in the hands of a receiver, and is wholly insolvent.

That during said time from 1882 to May, 1884, Townshend & Company were a co-partnership, doing business at Stillwater, Minnesota. That during all of said time, said co-partnership was composed of Dwight M. Sabin, J. H. Townshend and George M. Brush. That said co-partnership is insolvent, and is in the hands of a receiver.

That during said time from 1882 to May, 1884, the Chicago Railway and Equipment Company was a pretended corporation, organized under the laws of the state of Wisconsin. That said corporation was at all times without capital, or responsible stockholders. That said corporation is now and always has been insolvent.

FRAUD CHARGED.

First. That the defendants, Dwight M. Sabin and J. C. O'Gorman, acting as the officers of said corporation, The Northwestern Manufacturing and Car Company, during the said period from 1882 to May 10, 1884, without the authority of the board of directors or of said corporation, issued, negotiated and sold large amounts of commercial paper of the Northwestern Manufacturing and Car Company.

Second. That during said time from 1882 to May, 1884, the defendants, Dwight M. Sabin and J. C. O'Gorman, as such officers of the Northwestern Manufacturing and Car Company, indorsed in the name of said corporation, large amounts of commercial paper, theretofore made and issued as accommodation paper by Townshend & Co., The Union Depot Street Railway and Transfer Company, and the Chicago Railway and Equipment Company. And during said time it also issued a large amount of commercial paper and accommodation notes

of said Northwestern Manufacturing and Car Company, and did deliver the said notes so indorsed, and the said commercial paper and notes so made as accommodation maker, to the corporation of Seymour, Sabin & Co., for the use and benefit of that corporation, without making the proper entries upon the books of said Northwestern Manufacturing and Car Company. And that the said Dwight M. Sabin and J. C. O'Gorman did, after the delivery of said commercial paper to said Seymour, Sabin & Co., as aforesaid, conceal from the officers, directors and stockholders of the Northwestern Manufacturing and Car Company the fact that they had so loaned the notes, bills and credit of the said Northwestern Manufacturing and Car Company, to the said Seymour, Sabin & Co. That a large amount of said commercial paper remains unpaid, and a charge upon the assets of the Northwestern Manufacturing and Car Company, to the injury of the creditors and of the complainants.

Third. That Dwight M. Sabin and J. C. O'Gorman, as such officers of the Northwestern Manufacturing and Car Company, by false entries upon the books of said corporation, made the apparent profits of the business of said corporation for the year ending May 1, 1883, to be the sum of $322,000, when in truth and in fact the actual profit was but $22,000.

Fourth. That by reason of the fraudulent

loaning of the money, bills, notes and credit of the Northwestern Manufacturing and Car Company to said Seymour, Sabin & Co., the said Northwestern Manufacturing and Car Company became and was insolvent, and the entire capital thereof was lost to the creditors and stockholders of said corporation; and that the assets of said corporation at the time of the filing of said bill were not sufficient to pay and discharge the indebtedness of said corporation, including the indebtedness so alleged to have been *wrongfully created, or to pay over fifty cents on the dollar thereof.*

The bill of complaint then alleges, in substance, that on the sixth day of September, 1887, they caused to be presented to the district court at Stillwater, the petition of the receiver of the car company, setting forth that on or about the first day of September, 1887, he had received from certain persons and banks, among whom were the complainants in this action, a request to commence a suit against Dwight M. Sabin, the former president and J. C. O'Gorman, the former auditor and treasurer of said car company, to recover such sums of money from them, and the value of such property as had been lost to the corporation through their official misconduct while acting as such officers.

The said receiver did not deem it expedient to commence said action at said term, without

authority and sanction of the court. That the request made upon the receiver was attached, and made an exhibit to his petition. The said receiver prayed that such order might be made and direction given in the premises as the court might deem expedient. Upon the presentation of this petition the court made an order denying the application to compel the receiver to bring said action and refusing to allow him to bring the same.

The bill further alleges that by the unauthorized and fraudulent acts of said officers as aforesaid and of the loss sustained by the Northwestern Manufacturing and Car Company in consequence thereof, a right of action exists in favor of said corporation against said officers, to recover the amount of said loss. That upon the appointment of a receiver, such right of action passed to the receiver, who primarily is the only person now authorized to bring suit, and that by reason of the refusal of said court to allow or compel said receiver to bring suit the complainants herein have a right to bring the same.

The bill further alleges that *after* filing the original bill herein, and on the same day, plaintiffs made an application to the district court of Washington county for an order permitting them to make the receiver of the car company a party to this bill; that the district court of Washington county refused to allow the receiver to be so made a party.

The bill further alleges that at the same time and place an application was made to said court by the complainants to exclude from the contemplated order of sale then pending before it, the cause of action set out in this suit, and all other causes of action which the stockholders could maintain in right of the corporation, which application was refused.

That the said car company has never been dissolved and still has an existence, but that all of its corporate property and tangible assets have been taken in said creditors' suits, and placed in the hands of said receiver aforesaid, appointed by said district court of Washington county, and by order of said court sold at public auction in gross and delivered; that no meeting of the stockholders has been held since 1884 and no election of officers.

The bill then alleges the organization of the Minnesota Thresher Company, stating the purposes of its organization, among other things, to be as follows:

To purchase at judicial sale all the assets of the car company, including its good will, and to continue the business of the old company except the manufacture of cars.

The bill then alleges that Sabin and O'Gorman have obtained control of a majority of the board of directors of the said thresher company for the purpose of preventing an inquiry by the said thresher company into the claim or cause of action set up in this bill, and which

said thresher company, the bill alleges, attempted to purchase from the car company this cause of action. That having acquired the management of the thresher company, the said Sabin and O'Gorman procured the thresher company to make an application to the district court of Washington county, whose receiver was in the possession of the assets of the car company, for an order directing the sale of all the assets and rights of action of said car company as a whole. That the complainants were present on the hearing and protested against the sale of the assets of said car company, and particularly against the sale of such rights of action as the stockholders would have a right to maintain in the name of such corporation; which the corporation was unwilling to do, and which the receiver was not authorized to do. That the court, after a hearing, ordered a sale of all such property, assets and rights of action belonging to said car company, which are described in said order of sale as follows:

> "All the stock, property, things in action and "effects of the defendant, the Northwestern "Manufacturing and Car Company, of which E. "S. Brown has been appointed receiver in this "action, or which the receiver may be entitled to "as the same shall exist at the time of such sale; "including all real estate, buildings, machinery, "tools, patterns, fixtures, materials, articles man-"ufactured, manufacturing or in process of man-"facture, cash in hand, book accounts, letters "patent, choses in action, bills receivable, and

"all property, assets, claims, liens, and demands "of every name and nature, either in law or in "equity, and wherever situated."

And that the same was sold to the Minnesota Thresher Company for one million, one hundred and five thousand dollars and seventy-five cents; and the said sale was duly confirmed and the conveyances transferring said property duly made and delivered.

The bill further alleges that the said Minnesota Thresher Company are parties to the said fraudulent scheme of said Sabin and O'Gorman, and not purchasers in good faith, and have not acquired title to such rights of action by virtue of the sale aforesaid in the said proceedings of the district court of Washington county.

They further allege that they are advised and verily believe that the rights of action involved in this suit are of such a character that they can only be prosecuted by the corporation or receiver, or some one or more of its stockholders, and that it is not such an action or right of action as the corporation or its receiver, acting under the direction of the court could transfer to a purchaser so as to qualify such purchasers with the right to maintain such action. The bill nowhere alleges that the complainants are stockholders or in any way interested in the Minnesota Thresher Company.

As before stated, *the bill affirmatively alleges that the receivership still exists and is in full force.*

To this bill the defendants demurred upon the following among other grounds.

I.

That the receiver is a necessary party, hence there is a defect of parties.

II.

That the court had no jurisdiction.

The demurrer was sustained. Opinion by Mr. Justice Brewer; reported 36 Fed. 475.

RESPONDENTS' BRIEF.

FIRST.

We concede the law to be as stated in the bill of complaint, that if a right of action exists at all in this matter, it is one that exists in favor of the corporation. That upon the appointment of a receiver, said right of action passed to the receiver, who primarily is the only person now authorized to bring such suit. There is abundant authority for said proposition.

Thompson's Liability of Stockholders, Section 340.

Thompson's Liability of Officers and Agents of Corporations, page 377, section 2 of note.

Minnesota Thresher Mfg. Co. v. *Langdon*, 44 M. 39.

Merchant's Bank v. *N. W. Mfg. & Car Co.*, 48 M. 361.

This being true, and granting for the purpose of this argument that this court has jurisdiction of the subject matter of this action, there is undoubtedly a defect of parties defendant, and the demurrer should be sustained on that ground.

The receiver should have been made a party defendant. The rule as laid down by Pomeroy in the second volume of his work on equity jurisprudence is as follows: Section 1095.

"Wherever a cause of action exists primarily "in behalf of the corporation against directors, "officers, and others, for wrongful dealing with "corporate property, or wrongful exercise of cor- "porate franchises, so that the remedy should reg- "ularly be obtained through a suit by and in the "name of the corporation, and the corporation "*either actually or virtually refuses* to institute or "prosecute such a suit, then, in order to prevent "a failure of justice, an action may be brought "and maintained by a stockholder or stockhold- "ers, either individually or suing on behalf of "themselves and all others similarly situated, "against the wrong-doing directors, officers and "other persons; but it is absolutely indispensable "that the corporation itself should be joined as "a party—usually as a co-defendant. The "*rationale* of this rule should not be misappre- "hended. The stockholder does not bring such "a suit because *his* rights have been *directly* vio- "lated, or because the cause of action is *his*, or "because *he* is entitled to the relief sought; he "is permitted to sue in this manner *simply in "order to set in motion the judicial machinery "of the court.* The stockholder, either individ-

"ually or as a representative of the class, may "commence the suit, and may prosecute it to "judgment; but in every other respect the action "is the ordinary one brought by the corporation, "it is maintained directly for the benefit of the "corporation, and the final relief, when obtained "belongs to the corporation and not to the stock- "holder plaintiff. The corporation is therefore "an indispensably *necessary* party, not simply on "the general principles of equity pleadings in "order that it may be bound by the decree, but "in order that the relief, when granted, may be "awarded to it, as a party to the record, by the "decree."

Also by Thompson in his work on the Liability of Officers and Agents of Corporations, page 393:

"The corporation itself is an indispensable party "to the proceedings, and where by reason of his "failure and refusal to bring the suit, the share- "holders bring it in their own names, the cor- "poration must be made a party defendant."

See also,

Davenport v. *Dows*, 18 Wall. 526.

Greaves v. *Gouge*, 69 N. Y. 156.

Brinckerhoff v. *Bostwick*, 88 N. Y. 52.

Robertson v. *Smith*, 3 Paige Chan. 232.

Samuels v. *Holliday*, Wool. Rep. 400.

Charleston Insurance Co. v. *Seabring*, 5 Richardson's Equity, 342.

Samuels v. *Holliday*, 1 Kansas 612.

Ryan v. *Railroad Co.*, 21 Kansas 366.

Gardner v. *Pollard*, 10 Bosworth 674.

Colquitt v. *Howard*, 11 Georgia 569.

Cook on Stock and Stockholders, Sec. 738.

In the case of *Davenport* v. *Dows*, *supra*, the supreme court of the United States said:

> "That a stockholder may bring a suit when a corporation refuses, is settled in *Dodge* v. *Woolsley*, 18 How. 340, but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholders were unsuccessful to allow the corporation to renew the litigation in another suit, involving precisely the same subject matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

We invite the court's attention to the case of *Samuels* v. *Holliday*, 1 Kansas, *supra*; this was a case where the trustees of an express company, being a corporation, had fraudulently transferred certain property to Holliday, and an action was brought by certain stockholders ot recover back this property, alleging that the

corporation had refused to sue. Miller, Judge, said:

"But with whom must this accounting be "made? The equitable interest of the property "was in the express company; the wrong done "by the sale was to the damage of this company "while the legal title to the property was vested "by the deed in the trustees, who by the terms "of the trust had a right to take possession; the "real ownership was in the corporation. This "corporation is still in existence, as far as can be "known from the record. It appears by the "testimony in the case that there are creditors of "the company, whose debts would much more "than absorb any amount which could possibly "be recovered of Holliday and the trustees. * "* * Before any decree could be rendered "against Holliday, there must be such parties "before the courts as would make a decree final. "The court cannot render a decree against him, "requiring him to account and finally to pay "over a large sum of money, and leave him liable "upon the face of these proceedings to a suit "for the same matter to another plaintiff; so the "trustees have a right to claim that if they are "held responsible for a violation of their trust by "the court, it should see that they are not left "liable to suit for the same matter from a party "having a superior right and not bound by the "decree in this case. The party, and the only "party, who can make such a statement is the "express company. If the creditors have an "interest in the fund to be received from Holli- "day, and the trustees of the corporation repre- "sent that interest it must be worked out through "that corporation. If the parties in that suit

"have any such interest it is still more clearly "represented by the corporation of which they "are stockholders, in which right alone they "have any claim to be heard. For it is only "after the debts of the corporation are paid that "they have any equitable claim in the debts due "the company, and then only to a distribution in "common with all the stockholders. *The jur-* "*isdiction of this court over the express com-* "*pany as a party to this suit, is then an indis-* "*pensable requisite to any decree in the case;* "*if a decree can not be made binding upon the* "*company, no decree should be made at all, for* "*the whole case would be left open to be liti-* "*gated again at their instance, and to such a* "*suit by the company the present decree would* "*be no bar.*"

The court in the above case followed the decision of the supreme court of the United States, and the rules laid down by that court.

Again in the case of the *Charleston Insurance Company* v. *Seabring, supra*, a bill was filed by the stockholders against the president and directors of a banking corporation, to compel a retransfer to the bank certain shares in the stock of the bank which the bank itself had owned, and which the defendants had sold and purchased themselves, at less, it was alleged, than the market value. It was held the corporation should have been made a party.

In the case of *Colquitt* v. *Howard, supra*, the court said:

"If the directors of this or any other corpor-
"ation should refuse to prosecute by collusion
"with those who had made themselves unrespon-
"sible by negligence or fraud, or if the corpora-
"tion is still under the control of those who
"must be defendants in the suit, the stockhold-
"ers, or any one of them for himself and the
"others who are the real parties in interest, may
"file a bill in their own names. In such case the
"averment in the bill should clearly and dis-
"tinctly give jurisdiction, for equity interferes
"with great caution with common law jurisdic-
"tion over corporations. In such a bill the cor-
"poration must be made a party defendant."

The case of *Ackerman* v. *Halsey*, 37 New Jersey Equity, was a bill filed by Warren Ackerman, a creditor and stockholder in the Merchants National Bank of Newark, against the persons who were at the time of the failure of that bank, its directors. The receiver was also made a defendant. The suit was brought for the benefit of the complainant and all other stockholders who might come in and contribute to the expenses of the litigation. It was claimed that the directors of the corporation had fraudulently misappropriated the funds of the bank, and that the receiver of the corporation, appointed by the comptroller of the currency, had refused to bring a suit. The court said:

"For any willfull breach of their trust, or mis-
"application of the corporate funds, or for any
"gross neglect of, or inattention to their official

> "duties, the directors are liable in this court "(citing authorities); and the liability is to the "corporation in the first instance, where the cor- "poration is capable of acting, but if it refuses "to do so, then the person aggrieved may bring "the suit. If the corporation be insolvent and "its affairs in the hands of a receiver, he may "maintain the litigation; if he refuses or is him- "self involved a person aggrieved may sue."

That is to say, primarily, the corporation, or if insolvent, its representative must sue. But in case of their disability or refusal, a person aggrieved must bring the suit, making the corporation or its representative a defendant. Here the corporation is insolvent and there is a receiver. Under the national banking laws he would have been the proper person to bring the suit if he would. He, however, refuses to do so.

Counsel may claim that this case is an authority against us upon the proposition subsequently made in our brief, that the court has no jurisdiction of this case and cannot call the receiver of the district court of Washington county before it in this proceeding. The distinction between that case and the one at bar is this: A receiver of a national bank is not an officer of the court. He is appointed by an officer of an *executive* department of the government, to-wit, the comptroller of the currency, and when he takes possession of the property and franchises of the bank, he does so merely

as an officer of the treasury department, and not as an officer of the court, and the property is not in *custodia legis*. Here it is the *district court* which holds the assets of the corporation by its receiver. The refusal of that court to direct a suit cannot be imputed to it as a neglect of duty to be remedied by this court by means of a suit by other parties. It is only in case of a neglect of duty by the corporation or receiver vested with the title and primarily entitled to sue, that a third person—whether stockholder or creditor—can ever maintain an action in right of the corporation. The refusal of the district court to direct suit, a refusal presumably the result of a full investigation and hearing, is in effect an *adjudication* of that court that no such action should be brought, and that adjudication is not reviewable here.

The case of *Brinckerhoff* v. *Bostwick*, *supra*, was a similar case. The court said:

> "The bank was a proper and even a necessary "party defendant; it continued to be a corporation "notwithstanding the appointment of a receiver, "and the receiver may bring actions in its name. "*The receiver was also a necessary party, as it "was through him that the amount which might "be adjudged against the directors was to be "collected and paid over. The presence of both "of these parties was necessary to a final deter-"mination of the controversy.*"

Cook, in his work on the law of stock and stockholders, states the rule as follows:

> "The corporation itself is an indispensable

"party defendant to a stockholders' action for "the purpose of remedying a wrong which the "corporation itself should have remedied. This "rule is due to the fact that all possible future "suits by the corporation are hereby pre- "vented. The rights of the corporation are duly "ascertained and the remedy made effectual "against the corporation as well as others." "Sec. 692.

We presume that it will not be disputed that this cause of action passed into the hands of a receiver by his appointment. It is so alleged in complainants' bill and admitted by the demurrer. (See page 24, Complainants' Amended Bill). And certainly if he stands in place of the corporation, and, so far as concerns the bringing of this action, *is* the corporation, he is the necessary party, if the suit is brought by a stockholder.

Sec. 316, 320 and 321, High on Receivers.

Thompson's Liability of Officers and Agents of Corporations, Sec. 2, page 377, and Sec. 2, page 460.

Thompson's Liability of Stockholders, Sec. 340.

Minn. Thresher Mnfg Co. v. *Langdon*, 44 M. 39.

Merchants Bank v. *N. W. Mnfg & Car Co.*, 48 M. 361.

Thompson in his work on the Liability of Officers and Agents, page 377, says:

"The receiver of a corporation succeeds to the "title of the corporation and whatever rights it

"might have asserted against its unfaithful "directors, he may assert against them."

The complainants well know that the receiver who is in possession of this cause of action and represents the corporation, is a necessary party to the maintenance of the suit as evidenced by the fact that they applied to the district court of Washington county for leave to make him a party to this suit.

Waterman, in his work on Corporations, says:

"The receiver of an insolvent corporation "may, in his character as trustee for the stock- "holders, maintain an action to set aside illegal "or fraudulent transfers of the property of the "corporation made by its agents or officers or to "recover its funds or securities improperly con- "verted or misapplied."

Applying the above rules to this action, it is evident, that should the plaintiffs succeed in this suit and recover against the defendants, it would be no bar to another suit by the receiver for the same cause of action.

It appears by the bill of complaint that this corporation is insolvent. That not only the entire stock of the corporation has been absorbed, but that the entire assets are not sufficient to pay fifty cents on the dollar of the outstanding obligations of the corporation, so that whatever sum is recovered against these defendants would not be for the benefit of the stockholders in this corporation, but for the

benefit of the creditors of the corporation, to be distributed by the receiver in the due administration of the estate, under the direction of the district court of Washington county. This, we believe, is an insuperable barrier to the maintenance of this action, and the demurrer should be sustained on that ground.

The district court of Washington county refused to permit its receiver to be sued in this action. It was certainly within the jurisdiction of the court to refuse to allow its officer to be interfered with in the administration of the assets. The failure to get leave of that court to sue the receiver does not give this court jurisdiction to proceed without him, because his presence is absolutely necessary to a final determination of the subject matter. The court cannot proceed without him because he would have a right to bring another suit for the same cause of action. This court has established the rule that where one has such an interest that a final decree cannot be made settling the entire matter without his presence he is an indispensable party and the failure to make him a party goes to the jurisdiction of the court.

Chadbourn v. *Coe*, Circuit Court of Appeals, 51 Fed. 479.

Shields v. *Barrow*, 17 How. 139.

Rihon v. *R. R. Co.*, 16 Wall. 450.

Coiron v. *Millaudon*, 19 How. 113.

Williams v. *Bankhead*, 19 Wall. 563.

Kendig v. *Dean*, 97 U. S. 423.

Alexander v. *Horner*, 1 McCrary, 634.

These cases are to the effect that although the court for any reason cannot obtain jurisdiction of a party, whether by reason of nonresidence or otherwise, the court cannot proceed to settle the controversy between the remaining parties because the decree would effect the rights of the absent party. His presence is necessary to a final decree and his absence as a party to the proceedings is jurisdictional. (See especially opinion by Judge Caldwell in *Chadbourn* v. *Coe.*) Making the Northwestern Manufacturing and Car Company a party does not bind the receiver. The receiver is an officer of the court bound to act according to the dictates of the power that appointed him. All of the property and rights of action are vested in the court through its receiver. The corporation has no power to sue or to enforce any cause of action after his appointment. That a receiver cannot be sued without the consent of the court appointing him is too well settled to require argument.

Barton v. *Barber*, 104 U. S. 126.

Woerishoffer v. *North River Con. Co.*, 99 U. S. 398.

Jones v. *Browse*, 32 W. Va., 444.

Keen v. *Breckenridge*, receiver, 96 Ind. 71.

Merideth Village Savings Bank v. *Simpson*, 22 Kansas 302.

Gluck & Becker, Receivers of Corporations, 82.

II.

This court has no jurisdiction of the subject matter of this action. As said before if a cause of action exists against the officers of this corporation for mis-appropriating its funds that cause of action is a part of the assets of the insolvent corporation and by the appointment of a receiver it passed into the possession of the court. It became a cause of action which the receiver might enforce for the benefit of the corporation and its creditors under the direction of the court appointing him receiver. This right of action, therefore, is in the possession of the state court.

High on Receivers, sections 316-320-321.

Thompson v. *Phoenix Insurance Company*, 136 U. S. 297.

Thompson's Liability of Officers and Agents of Corporations, section 2, page 377.

Also section 2, page 460.

Nannburg v. *Hyatt*, 24 Fed. 901.

Simon v. *Man*, 33 Minn. 412.

Matter of C. J Company, 128 U. S. 553.

Richards v. *People of State of Illinois*, 81 Ill. 551.

Hazelrigg v. *Bronaugh*, 78 Ky. 63.

In the case of *Thompson* v. *Phoenix Ins. Co.*, 136 U. S. 287, Mr. Justice Harlan said:

"The title to property in the hands of a "receiver is not in him, but in those for whose "benefit he holds it. Nor in a legal sense is the

"property in his possession. It is in the posses-
"ion of the court, by him as its officer. *Wis-*
"*wall* v. *Sampson*, 14 How. 52, 65; *Heidritter*
"v. *Elizabeth Oil Cloth Co.*, 112 U. S. 294,
"304; *Chicago Union Bank* v. *Kansas City*
"*Bank*, just decided, *ante*, 223."

It is, however, unnecessary to discuss this question, it has been so universally settled in the federal and state courts as to be now beyond discussion. The complainant also alleges in his bill that this is an asset that passed to the receiver. It can make no possible difference that this right of action which passed to the receiver by his appointment was not tangible property and could not have an actual situs. The only difference being where a receiver is appointed, that tangible property having an actual situs does not pass to the receiver by virtue of his appointment except the situs of the property is within the jurisdiction of the court appointing a receiver, but as to the intangible property not susceptable of a situs it attaches to the corporation the same as to a person and the mere order appointing a receiver vests the title to the said property in the court subject to all the rules of law governing property in *custodia legis*.

Bishop on Insolvent Debtors, sec. 243.

Richards v. *People of the State of Ill.*, 81 Ill. 551.

The district court of the state of Minnesota having possession of this right of action, to

permit the plaintiff to maintain this suit, would be to divest and disturb the district court of the state in its possession, which possession and control is absolutely necessary to the administration of the estate. No principle is more thoroughly settled and no right more jealously guarded both by the state and federal courts than the absolute right to control assets of an insolvent corporation in the possession of the court and prevent any other court from interfering with that possession. This goes to the jurisdiction of the court in this case.

Hamilton v. *Chouteau*, 4 Fed. Rep. 339.

Conklin v. *Butler*, 4 Bissell, 22.

Bruce v. *Manchester & K. R. R.*, 19 Fed. 342.

Wiswall v. *Sampson*, 14 How. 32.

Peale v. *Fipps*, 14 How. 368.

Heidritter v. *Elizabeth Oil Cloth Co.*, 112 U. U. 294.

Richards v. *People of State of Illinois*, 81 Ill. 551.

Hazelrigg v. *Bronaugh*, 78 Ky. 62.

Meredith Village Savings Bank v. *Simpson*, 22 Kan. 293.

Levi v. *Columbia Life Insurance Co.*, 1 Feb. Rep. 206.

Walker v. *Flint et al.*, 7 Fed. Rep. page 435.

Peoples' Bank v. *Calhoun*, 102 U. S. 61.

77 N. Y. 272.

Bartran v. *Bartran*, 104 U. S.

As said by Judge Treat in the case of *Walker* v. *Flint*, *supra*:

> "The rule is, that when a state court has, "through any of its officers, custody of prop- "erty, a United States court will not inter- "fere with said custody; and, on the other hand, "will not permit interference with its own cus- "tody. That rule is essential under our complex "system of government to due harmony of "administration, and to avoid unseemly conflicts. "It rests not on comity alone, but on the true "theory of our governmental system, state "and federal. There is to be no interference, "one with the other, where each is acting within "legal limits; but, on the other hand, neither is "to transcend legal or constitutional limits, or "deprive a party of his constitutional rights."

Again, it is held in *Levi* v. *Columbia Life Insurance Company*, that were, under the insurance act of Missouri, proceedings had been instituted in the state court against an insurance company, which will finally result in the dissolution and administration of the affairs of that company, and the appointment of a receiver, that all intermediate proceedings must be disposed of in that tribunal. And the court bases its opinion upon the well known case of *Taylor* v. *Carryl*, 10 How. 583. The court says:

> "*Vice versa*, suppose there was a receiver of "this court in the custody and administration of "certain affairs, and the state courts attempted "to interfere with such administration, this court "would repel any such interference; and any "person who disputed the lawful custody of the

"officers of this court, who attempted to inter-
"fere with such administration, would be in con-
"tempt; but waiving that whether they would or
"would not, this court would insist upon its offi-
"cers administering the estate in due form. On
"the other hand, if the state court is in lawful
"possession of these matters, it must go on in
"its course without interference. They are in-
"dependent jurisdictions for the respective pur-
"poses."

The case of *Hamilton* v. *Chouteau*,, 6 Federal Reporter, page 339, has an important bearing upon the case at issue. It was a bill filed by the policy holders of the St. Louis Mutual Life Insurance Company for relief against its stockholders. Proceedings were commenced by the insurance commissioner to wind up the company, after which the directors, with the sanction of the insurance commissioner, conveyed and delivered all of the assets of the company, to the Mound City Life Insurance Company, which company agreed to re-insure all outstanding risks of the first named company, to pay all the liabilities thereof, and redeem and take up the stock of the first named company. Thereafter the Mound City Life Insurance Company became insolvent and was unable to keep its covenant of reinsurance and its other agreements. In consequence of this both companies were declared insolvent, and put in the hands of a receiver, by the state court of Missouri, and this suit was brought by the policy

holders of the St. Louis Mutual Life Insurance Company for relief against the directors and stockholders of that company, claiming that said transfer of the assets Mound City Company was fraudulent, and asking that the property in the hands of the of the Mound City Company be charged with a trust in favor of the plaintiffs. The suit was brought in the circuit court of the United States for the eastern district of Missouri. Judge Treat speaking of the jurisdiction of the court, says:

"By the terms of the bill it appears that the "various insurance companies named are in the "hands of receivers duly appointed by a state "court of competent jurisdiction, and that their "affairs are in the course of judicial administra- "tion. If the allegations of the bill are true, as "confessed by demurrer, said receivers are the "proper parties to receive whatever may be due "by defendants, so that the same may be distri- "buted *pro rata* among the creditors. Undoubt- "edly, if such a fraudulent scheme existed, as is "charged, whereby the parties defendant, for "their own private gain, caused the plaintiff and "other policy holders to be defrauded of their "lawful demands, said defendants should, in "a proper proceeding, be compelled to refund "for the common benefit. It must be observed, "however, that the bill, even in that view, is "fatally defective, except on one hypothesis, "imperfectly presented. The defendants, it is "charged, were respectively stockholders in the "St. Louis Mutual Life Insurance Company. "Each held a different number of shares. It "nowhere appears that said stock was not fully

"paid up, and consequently that the stockhold-
"ers were liable for the debts of the company.
"It is alleged, however, that all the assets of said
"company were, with their connivance, etc.,
"transferred to the Mound City Mutual Com-
"pany of whose shares of stock they were to
"receive a like number to those held in the St.
"Louis Mutual, subject to be paid off at par by
"the Mound City Mutual; that those shares were
"so paid off, and the defendants became the
"respective beneficiaries thereof; and that the
"only and main source of payment was from
"the St. Louis Mutual. Practically, the insol-
"vent St. Louis Mutual, through the fraud
"charged, secured to these canniving stockhold-
"ers full pay at par for their worthless stock out
"of the assets which should have been devoted
"to the payment of its debts.

"It is not doubted that under sufficient aver-
"ments in a proper state of such a case, equity
"would lay its hands upon funds thus fraudu-
"lently acquired, and apply them for the benefit
"of honest creditors. *But it is averred that the*
"*St. Louis Mutual is now, and has been for*
"*years, in the hands of a competent receiver, who*
"*is proceeding to collect and administering its*
"*assets for the benefit of all creditors. Why,*
"*then, should this court (the receiver being no*
"*party) undertake to collect and administer a*
"*fragment of the assets? Will a chancery court*
"*split assets and demands to the extent of up-*
"*holding as many suits as there may be creditors*
"*or items of assets? Instead of avoiding, there-*
"*by, it would indefinitely create a multiplicity of*
"*suits. If this court took charge of this suit it*
"*would be compelled to bring all the parties and*

"take custody of the assets, in order that each "creditor might receive his pro rata; for equality "is equity."

The supreme court of the United States, in the case of the *Peoples' Bank* v. *Calhoun*, 102 U. S. 261, adopts the same line of reasoning, and gives as a reason why a state court should not be permitted to exercise jurisdiction over property in the hands of a receiver appointed by the United States circuit court, that all courts should be permitted to determine what shall be done with property in the official jurisdiction of the court.

The court says:

"We think this was not only permissible, but "that it was the proper course to be pursued in "such a case. The jurisdiction of the circuit "court of the United States does not here depend "on the citizenship of the parties, but on the sub- "ject matter of the litigation. That was in the "actual possession of that court when the state "court attempted to levy its writ of attachment "on the property. It was for the court having "such possession to determine how far it would "permit any other court to interfere with that "possession, and what effect it would give to the "attempt of another court to seize the property "so under its control."

The court of appeals of the state of New York delivered an opinion in the case of the *Attorney General* v. *The Guardian Mutual Life Insurance Company*, 77 N. Y. page 277, in entire accordance with the views of the federal court above

quoted. In that case an action had been commenced against certain officers of the corporation to recover from such officers the value of property misappropriated by them. While the action, so commenced, was pending, a receiver was appointed of the assets, stock and franchises of the corporation, and thereupon, the court so appointing the receiver, issued an injunction in the action or proceeding in which the receiver was appointed, restraining the action already pending against the officers of the corporation.

The court says: "That suit was commenced "before the receiver of the Guardian Company "was appointed, and the relief asked was in part "prevented from being obtained in that action by "the appointment of a receiver upon the applica- "tion of the attorney general. The receiver as "the representative of all the creditors, was the "proper person to prosecute the action to recover "the assets of the Guardian Company, and he "commenced an action for that purpose, with "the sanction as it must be presumed, of the "court which appointed him. If the Carlisle "suit was continued and a recovery had therein, "the receiver would have been entitled to re- "ceive the fruits of judgment. The decree dis- "solving the corporation, and appointing a re- "ceiver, was a decree in the nature of a decree "in favor of all the creditors, and they were en- "titled to come in on the distribution and be "heard in respect to their claims. The supreme "court having acquired jurisdiction of the pro- "ceedings for winding up the affairs of the cor- "poration, had we think, jurisdiction to stay the

"suit of a creditor, brought to cover assets to "which its receiver was entitled, in whatever "court the suit was pending. The creditors are "parties to the proceeding for the dissolution "and winding up of the corporation through the "receiver, and such are subject to the control of "the supreme court, and may be restrained from "any interference with the assets in the hands "of the receiver, or with his administration of "the affairs of the corporation. The receiver "is the officer of the court appointing him, and "his possession is the possession of the court. "The court will not permit his possession to be "disturbed and will protect him from molesta- "tion in the discharge of his duties. (*Angel* v. "*Smith*, 9 Ves. 335; *Ames* v. *Trustees of* "*Birkenhead Docks*, 20 Beavan, 332; *De Win-* "*ton* v. *The Mayor of Brecon*, 28 id. 200; "*Columbian Book Co.* v. *DeGolyer*, 115 Mass. "67.) In respect to the question made that an "injunction staying the proceedings in the Car- "lisle suit, could only be obtained in an action "brought for that purpose, the answer is that "the decree dissolving the corporation, and for "a distribution of the assets, is a decree in the "nature of a judgment for all the creditors, and "they are subject to the summary jurisdiction of "the court in matters pertaining to the adminis- "tration of the estate of the insolvent corpora- "tion. (*Thompson* v. *Brown*, 4 Jo Chy. 642; "*In re Heminp*, 2 Paige, 316; *Travis* v. "*Myers*, 67 N. Y. 542; *Peck* v. *Crane*, 25 Vt. "146; 3 *Daniels'* Chy. Pr. 1617.)"

In *Wiswell* v. *Sampson*, 14 How. 32, Wiswell claimed the property under a receivers sale. The defendant under an execution sale. The

receiver was appointed in an action to set aside a conveyance of the property in fraud of creditors. The defendant had judgment upon this property which antidated the appointment of a receiver and pending the receivership took out execution and sold the property. The question involved was whether this sale was valid. The court conceded that the defendants prior lien should be protected but held that the property being in the possession of the court it could not be disturbed by any other court or proceedings.

Mr. Justice Nelson said:

"It has been argued, that a sale of the premises on execution and purchase, occasion no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigaton. Otherwise, the whole fund may have passed out of hands before the final decree, and the litigation become fruitless.

"It is true in administering the fund, the court will take care that the rights of prior liens or encumberances shall not be destroyed; and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possesion of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?

"There can be no difficulty in ascertaining the prior liens and encumbrances, as all of them are matters of record. Several of the judgment creditors came in, in this case, and received their share in the distribution."

In the case of *Pearle* v. *Phipps*, 14 How. 228, Phipps had sued the Agricultural Bank of Mississippi, in ejectment for certain property in the possession of the bank and mesne profits and had recovered a judgment for $34,000. Upon proper proceedings in the state court the bank had been placed in the hands of an assignee. This action was brought in the United States circuit court upon this judgment against the assignee without leave of court.

The court said:

"We see no ground upon which the jurisdic-
"tion of the court can be sustained. The plain-
"tiff in error held the assets of the bank as the
"agent and receiver of the court of Adams
"county, and subject to its order, and was not
"authorized to dispose of the assets, or to pay
"any debts due from the bank, except by the

"order of the court. He had given a bond for "the performance of this duty, and would be "liable to an action, if he paid any claim with- "out the authority of the court from which he "received his appointment, and to which he was "accountable. The property, in legal contem- "plation, was in the custody of the court of "which he was officer, and had been placed "there by the laws of Mississippi. And while it "thus remained in the custody and possession of "that court, awaiting its order and decision, no "other court had a right to interfere with it, or "to wrest it from the hands of its agent, and "thereby put it out of his power to perform his "duty. The case falls within the principal de- "cided by this court in *Vaughn* v. *Northrop*, 15 "Pet. 1, in which it was held, that an adminis- "trator could not be sued in another state for a "debt due from his intestate, because he is bound "to account for all the assets he receives, to the "proper tribunals of the government from which "he derives his authority. And that decision "was made in a case where the assets, by reason "of which the administratior was sought to be "charged, were received in the jurisdiction of "the government in which the suit was brought "against him, but in which he had not taken out "letters of administration."

To the same effect is the case of *Heidritter* v. *Elizabeth Oilcloth Company*, 112 U. S. 294, in which the court said:

"The substantial violation of the jurisdiction "of the district court consisted in the control "over the property in its possession as assumed "and asserted in commencing the proceeding to

"enforce against it liens claimed by the plaintiffs "in those actions, prosecuting them to judgment "and consummating them by sale."

In the case of *Richards* v. *People*, the district court of Illinois appointed one Wright receiver of a railroad company. Subsequent to the appointment of the receiver, Richards sued the company in the justice court and garnisheed a debtor of the railroad company thereby seeking to subject a chose in action to the payment of his debt. It was here claimed that the receiver had not reduced this chose in action to his possession. The same claim is made in the suit at bar.

The Court said:

"But conceding the appointment of the "receiver to have been valid, it is contended by "counsel for plaintiff in error that no contempt "was committed, since there was no actual inter- "ference with the receiver's possession.

"In this view of the case we cannot concur. "It is based upon the mistaken theory that prop- "erty or credits not yet actually reduced to the "receiver's possession, although the title thereto "has vested in him by virtue of his appointment, "may be seized or attached by creditors of the "original debtor, with impunity, and that in so "doing they are guilty of no interference with "the rights of the receiver. But it is to be "remembered that the receiver is the officer of "the court, and that his possession is the posses- "sion of the court itself; and any unauthorized "interference therewith, either by taking forcible "possession of the property committed to his

"charge, or by legal proceedings for that pur-
"pose, without the sanction of the court appoint-
"ing him, is a direct and immediate contempt of
"court, and punishable by attachment. *Roe* v.
"*Gibbon*, 7 Paige, 513; *De Visser* v. *Blackstone*,
"6 Blatchf. C. C. 235; *Lane* v. *Sterne*, 3 Gif.
"629; *Skip* v. *Harwood*, 3 Atk. 564; *Hull* v.
"*Thomas*, 3 Edw. Ch. 236; *Russell* v. *East*
"*Anglican Railroad Co.*, 3 Mac. and G. 104;
"*Langford* v. *Langford*, 5 L. J. N. S. Ch. 60;
"*Spinning* v. *Ohio Life Insurance and Trust*
"*Co.*, 2 Disney, 368.

"And, in our view of the case, it can make no
"difference in the application of the rule, whether
"the property is actually or only constructively,
"in the receiver's possession. Here, the order
"appointing the receiver directed him to forth-
"with take possession, and, if necessary, to sue
"for and recover all the property of the railway
"company, whether real, personal or mixed, and
"whether in possession or action.

"That order was the receiver's evidence of
"title and authorized him to immediately reduce
"to possession the credits and choses in an action
"which were garnisheed by Richards. The gar-
"nishee proceedings were a direct interference
"with the right of the receiver, since they
"attempted to deprive him of what was his
"under the order of his appointment. They
"were, therefore, an immediate obstacle, inter-
"posed by Richards, to the enforcement of the
"order of the court, and as such were plainly a
"contempt of its authority and powers."

In the case of *Merideth Village Savings Bank* v. *Sampson*, Sampson brought an action against Crippen as partner for dissolution of their

partnership and a receiver was appointed. The Savings Bank claimed that the partnership as agents of the bank had $1556 in their possesion belonging to the bank and asked leave of the court to make the receiver a party to the suit to have this money treated as a trust fund and paid over to the bank. The court consented but compelled the action to be brought in the same court appointing the receiver. After the commencement of the action the plaintiff presented his bond and petition and removed the case to the circuit court of the United States; thereupon the district court of Kansas revoked the order allowing the receiver to be made a party and dismissed the action, as to Crew, the rereceiver. The court said:

"The determination of the first question is "mainly decisive of the second, because, if the "court had the power to designate the forum in "which its receiver was to be sued, it clearly had "the authority to revoke its permission when it "was sought to be evaded or abused. The pro-"ceedings instituted by the plaintiff not only "questioned the title or right of the receiver to "the property claimed, but sought to disturb the "possession, which he held under the authority of "the court. A receiver of a court of justice has "been well said to be the arm of the court by "which he is appointed—a part of the court "itself. He is the agent of no one except the "court by which he is authorized to act. One "court having custody of property through its "receiver cannot admit that another court, in "defiance of its orders, has power to define what

"are the duties with reference to such property. "To admit this is substantially to say that one "co-ordinate court can sue another. This can- "not be done. The rule stated is established by "so many authorities that citation is scarcely "necessary. Every consideration of economy, "of the prevention of vexatious litigation and "conflicts of jurisdiction, would indicate the "importance of protecting the exclusive possess- "ion of the receiver by an inflexible "rule of law. Even the cases of *Kin- "ney* v. *Crocker*, 18 Wis. 80, and *Allen* v. "*Central R. Co.*, 42 Iowa 683, which assert the "right in some actions to sue receivers without "leave to prosecute being first obtained of the "court appointing them, concede 'that a court "of equity will, on proper application, protect "its own receiver, when the possession which he "holds under the authority of the court is sought "to be disturbed.' The appointment of Crew "as receiver of the effects and property of the "partnership in the action of Simpson against "Crippen, by the court below, secured to that "court the power to control at its discretion all "controversies which affected the property placed "in his custody. It thereafter had the right "to take to itself all such controversies, and "compell parties to proceed nowhere else than in "its own forum."

We are not surprised that both the state and and the federal court have refused to take jurisdiction in such cases where the property was in the actual custody of another court as it would lead to endless difficulties. The receiver of the Northwestern Manufacturing and Car

Company is an officer of the district court of Washington county. Whatever might be recovered in this action, would be the property of such receiver to be by him distributed to the creditors under the final decree of the court in the proceeding in which he is appointed. He is not an officer of this court, and the United States circuit court for the district of Minnesota, could not lay its command upon him and require him to take this fund and distribute it. The court could not order a distribution of it through its own officers without first going through the almost endless labor of ascertaining who the creditors of the Northwestern Manufacturing Car Company were, and assigning to each of such creditors their distributive share, and to do so, it must necessarily take from the custody of the district court of Washington county, property rightfully in the custody of that court, and attempt to distribute the same by its own order, a stretch of jurisdiction nowhere recognized by either state or federal courts.

It appears by the bill that this corporation is insolvent and therefore all amounts collected in this proceeding belong to the creditors and must be paid to them, either by the receiver or by direct order of the court.

On the other hand if it is conceded, as it must be, that this fund so recovered, is a fund that must be distributed by the receiver, this court has no jurisdiction to call that receiver

before it and command him to so distribute it. But in fact, the command would be to the receiver to do precisely what by order of the district court of Washington county he is directed not to do. This court cannot and should not examine into the reasons that may have moved the district court of Washington county at present to deny permission to the receiver to proceed with this suit. They undoubtedly were ample and satisfactory to the court. The same prudential reasons might have influenced the court to deny to the receiver the privilege of bringing this action that are hereafter suggested as possible influences upon the mind of the court in reference to permitting of this right of action.

Waterman, in his work on Corporations, section 373, says:

> "When the court of a state has a railroad or "other property in its possession for administra- "tion as trust assets, and has appointed a "receiver to aid it in the performance of its duty, "by carrying on the business to which the prop- "erty was adapted, until such time as it can be "sold with due regard to the rights of all persons "interested therein, a court of another state has "no jurisdiction, without leave of the court by "which the receiver is appointed, to entertain a "suit against him for a cause of action arising in "the state in which he was appointed, and in "which the property in his possession is situated, "based on his negligence or that of his servants "in the discharge of their duty in respect to such "property."

The right of action against the officers of the corporation having passed to the receiver and into the custody of the law, it then rested in the sound discretion of the district court of Washington county to say what should be done with this right of action.

In the exercise of that discretion the court might deem it prudent, as it did in this instance, to permit the right of action to be sold as a part of the assets of the corporation. Many very sound reasons might have influenced the court so to direct. The length of time necessary to litigate the question with the officers alleged to have so misconducted themselves; the expense of such litigation; the delays in the settlement of the estate; the knowledge of the court of the character of the evidence which would be produced to sustain the charge; the insolvency of the parties against whom the action was brought (if such was the case); or the desire on the part of a large majority of the creditors for the immediate winding up of the affairs of the receiver; each and all might have operated in the mind of the court to induce the court to direct the sale of this right of action, rather than to permit the receiver to bring an action to recover from the defendants.

In exercising this discretion the court occupied precisely the same position as it would have done had it directed the disposition of any tangible property in the custody of the

court; and the circuit court for the United States cannot interfere with the action of the district court of Washington county, and take from its possession, or permit any other person to take from its possess-ion, this right of action, and proceed to litigate the same in another court, not having jurisdiction of, or in the possession of this right of action.

If the rule of law were to the contrary of what we have suggested, then every right of action belonging to the receiver by virtue of his appointment, and in the custody of the law and under the control of the district court of Washington county, might be taken from the control and possession of that court, or the possession of that court disturbed by the action of other courts of independent jurisdiction, and the hands of the district court of Washington county so tied that it would be unable to administrate the affairs of the estate, dispose of the assets and pay the creditors.

But it is alleged in the bill of complaint that this is not such an asset or chose in action as passed by the sale to the Minnesota Thresher Company; that it was not sufficiently described in the order of sale and in the instruments conveying the same. The order of sale was set out at length in the bill, and the order confirming the report of sale, so that this court can see for itself whether it is sufficient to pass said cause of action. But it seems to us that it is

immaterial whether it passed or not. If it did pass into the hands of the Thresher Company by that sale, then the receiver and the car company have realized on this cause of action, and the proceeds of this cause of action have gone into the hands of the receiver, and complainants not being stockholders or in any way interested in the Minnesota Thresher Company, certainly have no standing in this case. Their right of action ceased the moment that the right of action on the part of the receiver was at an end, to-wit, at the time of the sale; but on the other hand, if the cause of action was not sold, and did not pass into the hands of the Thresher Company, then it still remains in the hands of the receiver to be enforced by him, and this court has no jurisdiction for the reasons hereinbefore stated.

The complainants in this case are not without their remedy. If the court erred in making the order refusing to allow the receiver to bring suit, it can be reviewed by the supreme court of Minnesota, on appeal from a final judgment of distribution in the winding up of this corporation.

It is unnecessary to refer to the numerous cases in the federal courts where the rules covering these actions are stated; but we might cite the court to the case of *Hawes* v. *Oakland*, 104 U. S. 450, and the case of *City of Quincy* v. *Steele*, 7 S. C. Reporter, page 521.

In *Hawes* v. *Oakland*, the court said:

"We understand that doctrine to be that to "enable a stockholder in a corporation to sus- "tain in a court of equity in his own name, a suit "founded on a right of action existing in the cor- "poration itself, and in which the corporation "itself if the appropriate plaintiff, there must "exist as the foundation of the suit, some action "or threatened action of the managing board of "directors or trustees of the corporation which "is beyond the authority conferred on them by "their charter or other source of organization;

"Or some such fraudulent transaction com- "pleted or contemplated by the acting mana- "gers in connection with other parties, or among "themselves, or with other shareholders, as will "result in serious injury to the corporation, or "to the interests of other shareholders;

"Or where the board of directors, or a major- "ity of them, are acting for their own interest, "in a manner destructive of the corporation "itself, or of the rights of the other sharehold- "ers * * *"

Then the court adds:

"But in addition to the existence of other "grievances which call for this kind of relief, it "is equally important that before the shareholder "is permitted in his own name to institute and "conduct a litigation which usually belongs to "the corporation, he should show to the satisfac- "tion of the court that he has exhausted all the "means within his reach to obtain, within the "corporation itself, the redress of his grievances, "or action in conformity to his wishes. He "must make an earnest, not a stimulated effort, "with the managing body of the corporation, to "induce remedial action on their part, and this

"must be apparent to the court. If time per-
"mits, or has permitted, he must show, if he fails
"with the directors, that he made an honest
"effort to obtain action by the stockholders as a
"body, in the matter of which he complains.
"And he must show a case, if this is not done,
"where it could not be done, or it was not reason-
"able to require it."

Now, in the case at bar, the efforts shown are an application to the district court of Washington county. The ground on which these actions are allowed to be brought by the stockholders is that a wrong has been committed by the corporation or the officers in charge or the majority of the stockholders having control of the corporation, which wrong will result in an injury to the stockholder by virtue of his interest in the corporation. In the case at the bar, in order to allow these plaintiffs to sustain this action the court must pre-suppose a wrong on the part of the district court of Washington county, in refusing the application of complainants to compel the receiver or allow the receiver to bring his suit. This court will not presume that the court of Washington county committed a wrong and it is clear that the court was the only authority to apply to, to set the machinery of the courts in motion. Complainants could not apply to the stockholders or to the directors, because they had no control over the corporation. They were compelled to do as they did, to apply to the district court, and having been refused there, their remedy was by appeal

not by a suit in this court, which must presuppose a wrong committed by the state court in refusing their application.

THIRD.

The amended bill to which this demurrer is interposed is fatally defective in failing to comply with equity rule ninety-four. It is not sworn to as by that rule required. The original bill was sworn to but on this hearing we are not concerned with the original bill. That is superseded by the amended bill this demurrer is interposed to the amended bill and to that alone.

The only question on this hearing is on the sufficiency of tl ; amended bill, and on that question the ame ıded bill cannot be aided by the averments or the verification of the original bill. And the bill further fails to comply with rule ninety-four in this: That rule requires the bill to "set forth with particularity the efforts of plaintiff to secure such action as he desires on the part of the managing directors," etc. Under this rule the bill should certainly show, not merely that plaintiff requested the directors to act, but it should particularly set forth the statements of fact made by plaintiff to the directors, as the basis of his request for their action. And by parity of reasoning when the plaintiff based his right of action on the refusal of the state court to direct its receiver to sue, he must set forth with particularity the

case made by him on his application to such court, that this court may see that such application was in good faith and on a full showing, and was not made on a purposely insufficient showing, as a mere pretext for bringing a suit by plaintiff in this court.

We respectfully submit that the judgment should be affirmed.

FRANK B. KELLOGG, AND
DAVIS·KELLOGG & SEVERANCE,
Defendants' Solicitors.

FRANK B. KELLOGG,
Of Counsel.

149 U.S. 423

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BRIEF FOR APPELLEE, MINNESOTA THRESHER MANUFACTURING COMPANY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

Term No. 221.

HENRY H. PORTER AND RANSOM R. CABLE,
APPELLANTS,

vs.

DWIGHT M. SABIN, JOSEPH C. O'GORMAN, *et al.*,
APPELLEES.

APPEAL FROM THE CIRCUIT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FRANK W. M. CUTCHEON,
Counsel for Appellee,
The Minnesota Thresher Manufacturing Co.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

HENRY H. PORTER AND RANSOM R. CABLE,
APPELLANTS,

vs.

DWIGHT M. SABIN, JOSEPH C. O'GORMAN, THE NORTHWESTERN MANUFACTURING AND CAR COMPANY, AND THE MINNESOTA THRESHER MANUFACTURING COMPANY,
APPELLEES.

BRIEF FOR APPELLEE, THE MINNESOTA THRESHER MANUFACTURING COMPANY.

I shall add to the principal brief for the appellees (upon which I rely in all other respects) one or two observations upon a point that peculiarly concerns the appellee, the Minnesota Thresher Manufacturing Company. I shall attempt to show that it appears by the bill that the appellants have no right or capacity to maintain this suit; that such right, if any exists, resides exclusively in the Minnesota Thresher Manufacturing Company.

STATEMENT OF FACTS.

A complete outline of the pertinent allegations of the amended and supplemental bill of complaint will be found in the principal brief for the appellees. I here call attention only to those allegations that specially bear upon the proposition above advanced.

The amended and supplemental bill (*Record, pp.* 18 *to* 39,) sets out the organization of the Minnesota Thresher Manufacturing Company for the purpose (among others) of acquiring the capital stock, evidences of indebtedness issued by, and the assets of, the then and still bankrupt Northwestern Manufacturing and Car Company. (*Record,*

fols. 50 *and* 51.) The committee representing the incorporators stated two of the objects of the new company to be, "Third. To "purchase at the judicial sale, which will ultimately be made in the "action now pending wherein the present receiver has been appointed, "all the assets, including the good will, of the old company, as an "entirety and as a 'going concern.' Fourth. Thereafter to continue "the business of the old company in all its branches, except the man- "ufacture of cars." (*Record, fols.* 51 *and* 52.)

Subsequent to June 15, 1887, the Minnesota Thresher Manufacturing Company made an application to the District Court of Washington County, Minnesota, whose receiver was then in possession of the assets, and was managing the affairs of the insolvent Car Company, for an order directing a sale of all the rights and assets of the Car Company as an entirety. At the hearing upon this application the complainants appeared by counsel and opposed such a sale, particularly the sale of the right of action set out in the bill of complaint in this suit (which was then pending), or any "such rights of action as "the stockholders (of the Car Company) would have a right to main- "tain in the name of said corporation, if the corporation itself were "unable or unwilling to do so, or if the receiver was not authorized so "to do." The Thresher Company insisted that all rights of action should be sold with the tangible assets. (*Record, fols.* 50 *and* 57.)

Upon this application an order was made by the Washington County Court for the sale of all the rights and assets of the Car Company and its receiver, as a whole. The rights and property to be sold were described in the order of sale as follows:

"All the stock, property, things in action and effects of the defen- "dant, the Northwestern Manufacturing and Car Company, of which "E. S. Brown has been appointed receiver in this action, or which the "receiver may be entitled to, as the same shall exist at the time of "such sale; including all real estate, buildings, machinery, tools, "patterns, fixtures, materials, articles manufactured, unmanufactured "or in process of manufacture, cash in hand, book accounts, letters "patent, choses in action, bills receivable, and all property, assets, "claims, liens, and demands of every name and nature, either in law "or equity, and wherever situate." (*Record, fols.* 57 *and* 58.)

In pursuance of this order the rights and property so described were sold at auction (October 27, 1887,) to the Minnesota Thresher Manufacturing Company. Subsequently an order was entered confirming the sale and describing the rights sold substantially as they had been described in the order of sale. The Thresher Company paid the price bid by it and was subsequently, and prior to the filing of the amended and supplemental bill, put in possession of all the rights and property so sold to it. (*Record, fol.* 58 *and stipulation, Record, fol.* 73.)

It will be remembered that September 6, 1887, prior to the entry of the order of sale above referred to, the complainants had applied to the Washington County Court for an order directing the receiver of the Car Company to bring suit against the defendants, Sabin and O'Gorman, upon the same causes set out in the amended and supplemental bill, and that the application had been denied (*Record, fols.* 47 *and* 48); also that upon the day the original bill was filed (September 9, 1887,) the complainants had applied to the Washington County Court for leave to make the receiver of the Car Company a party to the bill and this application had also been denied. (*Record, fols.* 49 *and* 50.)

The bill exhibits an ingenious attempt to evade the effect of all these proceedings by charging that Sabin and O'Gorman, in December, 1886, for the purpose of preventing an investigation of their conduct as officers of the Car Company, fraudulently obtained control of the Board of Directors of the Thresher Company, and through the Board, thus dominated, obtained control of its stock (*Record, fols.* 55 *and* 56); that they procured the Thresher Company to make the application for the order of sale mentioned above (*Record, fol.* 57). It is also charged that at the time of the making of the orders of sale and confirmation and of the sale itself, the Thresher Company had notice of the filing of the original bill in this suit. (*Record, fol.* 59.) Nowhere in the bill is it alleged that the complainants are shareholders in the Minnesota Thresher Manufacturing Company or that anyone of the shareholders of that company has objected to the proceedings by which Sabin and O'Gorman are said to have obtained control of the company, or was ignorant of the facts connected therewith. It is not alleged that any misrepresentation was made to the Washington County Court, in order to induce it to take the course adopted by it. Nor is it claimed that the judge of that court was ignorant of any fact charged in the bill.

POINTS AND AUTHORITIES.

I maintain that it appears from the allegations of the bill, recited above, that the right of action, which the complainants are attempting to assert in this suit, in right of the corporation, (assuming that any such right exists or ever existed,) passed by the judicial order of October 27, 1887, to the Minnesota Thresher Manufacturing Company; that this company since that date has possessed the exclusive title to maintain suit upon that right. I understand the complainants to contend, (first) that this right of action was incapable of assignment and transfer; (second) that the terms of the orders of sale and confirmation were not sufficiently explicit to pass this right, even if capable of assignment; and (third) that a purchase of this right by the Thresher Company was by reason of that company's complicity with Sabin and O'Gorman in their fraudulent purpose to prevent an

investigation of their misdeeds ineffectual and void. I shall treat these different positions briefly, in their order as *above stated.*

It is conceded by complainants that if Sabin and O'Gorman negligently or fraudulently mismanaged the affairs of the Car Company, a right of action on account of such mismanagement immediately arose in favor of that corporation. It was a right which belonged, not to the shareholders or creditors of the company, but to the *corporation* whose estate had thereby been depleted.

Smith vs. Hurd, et al., 12 *Met.* 371.

Moreover, it is conceded that this right passed by operation of law to the receiver of the Car Company upon his appointment. From the receiver, I maintain, it passed to the Thresher Company.

The right of action, if any, which arose in favor of the Car Company on account of the misfeasance of its officers, was assignable.

The rule of distinction between rights of action that are assignable and those that are not, is, of course, this: All rights of action that survive to one's personal representatives are assignable. All others are incapable of assignment. At this day the distinction stated may seem somewhat artificial and arbitrary, but it has been firmly established and is still vigorously maintained by the courts. I suppose that since, prior to the time when the assignability of choses in action was first recognized in equity, the courts had established a definite rule as to what class of rights of action would survive, it was naturally assumed, when the assignability of a chose in action came to be conceded, that the class of rights that would descend by operation of law to the personal representatives of a deceased person must include everything of which that person, during his life, had the power of disposition. However this may be, the rule has become so firmly established as to be a rule of property—at least in Minnesota.

See

Comegys vs. Vasse, 1 *Peters*, 193.
People vs. Tioga Com. Pl., 19 *Wend.*, 73.
Grant vs. Ludlow's Adm'r, 8 *Ohio St.*, 1.
Tuttle vs. Howe, 14 *Minn.*, 145.

In the last case this rule seems to be adopted in the State of Minnesota as an absolute test of assignability. The case involved the assignability of the lien of a material man which, by statute, was made to survive to his personal representatives. The court, in holding the claim and security in such case assignable, says: "It is a settled gen-"eral rule that whatever rights of action or of property survive to an "executor or administrator are assignable. * * * Applying this "rule it would follow that under our statute the lien of a material man "or mechanic is assignable."

Now, under the common law, those rights arising from wrongs of a purely personal character, resulting neither directly nor indirectly in any loss to the estate of the person suffering, did not survive. All other rights including all those that arose from some injury to the estate of the person suffering, whether the injury occurred through breach of contract or through tort, did survive.

Dickinson vs. Burrell, L. R., 1 *Eq.*, 337.
Gresley vs. Mousley, 4 *De G. and J.*, 78.
Stump vs. Gaby, 2 *De G., MacN. and G.*, 623.
Jordan vs. Secombe, 33 *Minn.*, 220.

The reason of this rule is obvious. An injury strictly personal to the deceased cannot in any way—at least under ordinary circumstances—affect detrimentally those entitled to his estate. Their personal rights have not been invaded and they are not made to suffer in their material interests. On the other hand, from the effect of any injury to the estate or property of the deceased, those succeeding to his estate do suffer to the same extent that the deceased suffered at the time of his death.

Applying the rule stated, it is obvious that had the defendants, Sabin and O'Gorman, been employed by an individual and had they been guilty of such misconduct in the management of his affairs as is charged in this bill, the right of action against them arising from such misconduct, would descend to the personal representatives of the employer. The bill from its introductory part to the prayer for relief is composed of allegations of misfeasance causing injury to the estate of the Car Company. The relief demanded against Sabin and O'Gorman is an accounting of all money and assets that came into their hands as officers of the Car Company; as to their conduct in imposing liability upon its estate; and that they may be required to pay into court all sums of money which, upon such accounting, are found to be due from them.

Moreover, in Minnesota the common law rule with reference to the survival of rights of action has been somewhat extended by the provisions of *section* 1, *of chapter* 77, *of the Gen. Statutes, Minn.*, 1878, which reads: "A cause of action arising out of an injury to the "person dies with the person of either party, except as provided in the "next section;" (the next section creates a right of action on account of injuries causing death;) "all other causes of action by one against "another, whether arising on contract or not, survive to the personal "representatives of the former and against the personal representa-"tives of the latter."

No argument is necessary to demonstrate that *under this statute* a right of action, such as that here in suit, survives to the personal representatives of an individual in whose favor it has accrued. As we have seen in the case of *Tuttle vs. Howe, supra*, the Supreme Court

of Minnesota hold that everything which by a statute of that state (as well as by the rules of the common law,) is made to survive, is also made assignable.

It is manifest, therefore, that this right of action was capable of assignment. Indeed, in view of the provisions of the Minnesota statute, it would be difficult to imagine any right of action arising in favor of one of those fictitious entities called corporations that would not be assignable.

It is not a sufficient reply to this, to say that to permit an assignment of this right of action would be to concede the possibility of selling a mere right to bring a law suit. There are many rights capable of enforcement and realization only through the medium of a law suit. The books are full of cases in which the assignability of such rights has been conceded.

See *cases above cited.*

In the case of *Merrill vs. Grinnell*, 30 *N. Y.*, 594, it was held that a right of action against a common carrier to recover the value of property entrusted to him, but not delivered by him to the consignee, is assignable and that the assignee may sue in his own name.

To the same effect see

Waldron vs. Willard, et al., 17 *N. Y.*, 466.
Smith vs. N. Y. & N. H. R. R. Co., 28 *Barb.*, 605.

In the case of *McKee vs. Judd*, 12 *N. Y.*, 622, the Court of Appeals of the State of New York held that an assignment of all the assignor's property and estate passed a right of action for the wrongful taking and conversion of personal property—in that case a horse and wagon.

To the same effect see

Langdon vs. Thompson, 25 *Minn.*, 509.
North vs. Turner, 9 *S. & R.*, 244.
Lazard vs. Wheeler, 22 *Cal.*, 139.
More vs. Massini, 32 *Cal.*, 590.
Hawk vs. Thorn, 54 *Barb.*, 164.

In the case of *Byxbie vs. Wood*, 24 *N. Y.*, 607, it was held by the same court that the assignee of a cause of action may recover money that was paid by the assignor upon false representations of the defendant. See also *People vs. Tioga Com. Pl., supra.*

In the case of *Stewart vs. Balderston*, 10 *Kan.*, 131, it was held that the assignee of claims against the register of the Humboldt Land Office for fees illegally exacted might recover upon such claims.

But in the case at bar the right to recover damages for the misfeasance of Sabin and O'Gorman was not sold as an isolated right but as part of, and pertaining to, the whole estate of the injured company. Had the wrong not been committed the tangible property acquired by the Thresher Company would have been of larger value, the credit and good will of the business would have been greater, and the possibility of profit from the Thresher Company's investment, more considerable. The purchaser of the whole estate, therefore, suffers from the acts of the defendants mentioned just as severely and in the same manner as the corporation did in the first instance. The Thresher Company is in the same relative position as would be the personal representatives of a deceased person who had suffered *like damage.*

It should be added that to hold that this right of action is assignable can in no way affect either the interests or the remedies of the creditors of the Car Company. It is alleged in the bill that the Car Company is insolvent and that its assets are insufficient to meet its liabilities. Its creditors, therefore, at the time of the filing of the bill in this suit had their own remedy against the officers of that company for any acts of misfeasance that resulted in injury to the estate of the corporation.

See,

Patterson vs. Stewart, 41 *Minn.*, 84.

The terms of the orders of sale and confirmation were sufficiently explicit to pass to the Thresher Company the right of action asserted by the bill filed in this suit.

It will not be contended that the language of the order of sale, if given its usual and full significance, does not include the right of action asserted by the bill.

It is conceded by the complainants that this right of action passed to the receiver of the Car Company upon his appointment. This could result only from the effect given to the language of the statute under which the receiver was appointed. The pertinent portion of that statute (*Sec. 9, Chap. 76, of the Gen. Statutes Minn.*, 1878,) reads as follows: "The District Court within the proper county may sequestrate the stock, property, things in action and effects of such corporation and appoint a receiver for the same." Certainly the language of this statute is much broader and less explicit than that of the orders of sale and confirmation which I have quoted in my statement of facts.

See also,

Comegys vs. Vasse, 1 *Peters*, 193, *page* 218.

The judicial sale under which the Thresher Company derives its title obtains virtue from the statute (*Secs.* 9 *and* 10, *Chap.* 76) and the same considerations, affecting the purpose of the act and public policy upon the subject, that require that the statute shall be interpreted so as to give to the court full right, through its receiver, to reduce to possession all choses in action formerly held by the corporation require that the order of the court whereby it attempts to realize upon those rights, receive a construction calculated to carry into effect the purpose of the order.

So far as the objection that this right was not particularly designated in the order of sale, and consequently not affected by it, goes, it does not lie in the mouths of these complainants to say that this right was not included in, or within the intent of, the order of sale made by the Washington County Court. By their own showing, they applied to the court, while the application for the order of sale of the Car Company's estate was pending before it, for an order excluding this right of action from the order of sale. It appears that the court denied their application. There is but one legitimate conclusion and that is that the court preferred that this right of action should be sold with the rest of the Car Company's estate and that the order of sale was intended to include this right with all the rest. As between these complainants, who avowedly made or instigated the application just referred to, and the Minnesota Thresher Company which, as appears by the bill, was a party to the proceedings in the Washington County Court, this question should be in the nature of *res judicata.*

But more than this, any person bidding or desiring to bid at the judicial sale of the Car Company's estate was chargeable with whatever appeared on the face of the record of the action wherein the sale was made. Upon that record it expressly appeared that application had been made to exclude this right from the order of sale, that this application had been refused, and that subsequently an order of sale had been made, so sweeping in its terms as to include every possible right held or owned by the corporation or by its receiver as a part of its estate.

It is difficult to see upon what principle the language of the order of sale can be limited in its significance so as to exclude the right of action asserted *in this suit.*

Nothing is charged in the bill that can have the effect of avoiding the Thresher Company's purchase of this right of action.

The mere fact that the Thresher Company is controlled by Sabin and O'Gorman furnishes no reason why, if this cause of action, being assignable, has been actually sold to that company, the sale should be set aside or disregarded. The complainants are not in a position to take advantage of any fraud *upon* the Thresher Company or its

shareholders. The allegations of the bill are, *at the very most*, nothing more than a charge of conspiracy upon the part of Sabin and O'Gorman on the one side, and the Thresher Company on the other, fraudulently to prevent an investigation of the misdeeds of Sabin and O'Gorman in conducting the affairs of the Car Company. Such a conspiracy, however, would amount to nothing (no recovery could be founded upon it) unless its designs were carried out. But there is no charge in the bill that either Sabin and O'Gorman or the Thresher Company made any misrepresentations, or in fact did anything, either to mislead the Washington County Court or to keep it in ignorance of the true state of facts, either with reference to the conduct of Sabin and O'Gorman, or with reference to the existence, the character, or value of the claim of the corporation against them. No collusion between the court and the defendants is even charged. It expressly appears by the bill that the Washington County Court was fully informed with reference to the subject matter of this controversy, (*Record, fol.*, 409). There were many considerations that were calculated to induce the court to take the course it did. It may have been of the opinion that more could be realized from this right of action through process of sale than through process of suit. After investigation of the facts the Court may have been of the opinion that in fact no such right of action existed and that it would be unjust to the defendants, Sabin and O'Gorman, to leave the matter in such position that suit might or could be brought against them. It may have been of the opinion that to sell this right of action with the remainder of the estate would induce more and better bidding at the sale. There are many perfectly proper considerations which may have, and probably did, operate upon the mind of the court and certainly nothing appears from the bill from which a presumption can arise that the court acted unfairly or ignorantly, or that the Thresher Company participated in any concealment or fraud.

I think I have demonstrated, that the cause of action, if any, that the complainants assert by their bill, was a portion of the Car Company's estate in the hands of its receiver; that it was assignable; that it was assigned; and that the defendant, the Minnesota Thresher Company, by the assignment, obtained a perfect and unimpeachable title to it. I respectfully submit that the decree of the Circuit Court for the District of Minnesota should be affirmed.

FRANK W. M. CUTCHEON,
Counsel for the Appellee,
The Minnesota Thresher Manufacturing Co.

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RECORD, CASE No. 13,888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~607~~. 269

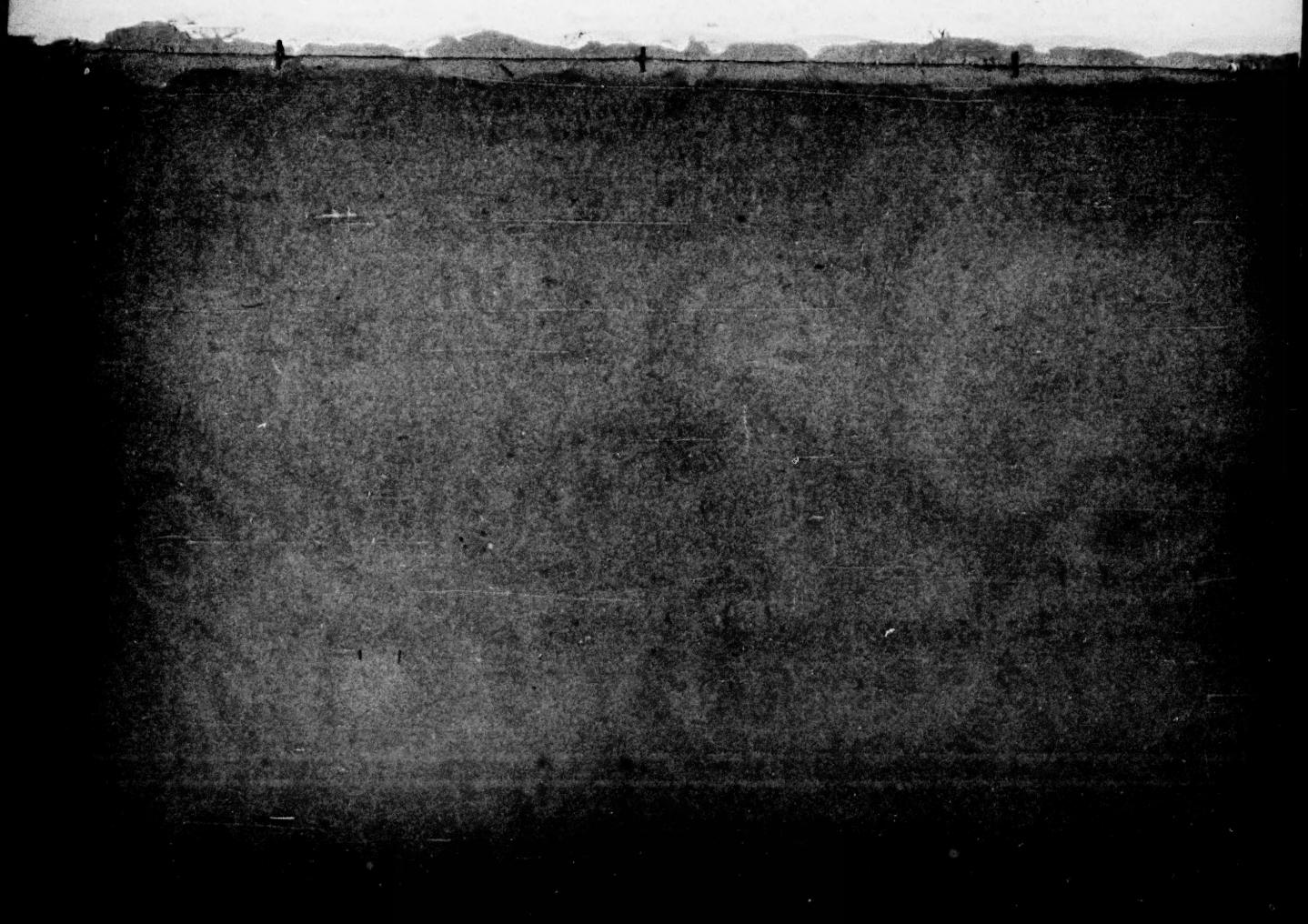
BENAJAH S. BIBB, PLAINTIFF IN ERROR,

vs.

THOMAS H. ALLEN, THOMAS H. ALLEN, JR., RICHARD H. ALLEN, AND HARRY ALLEN, PARTNERS UNDER THE FIRM NAME AND STYLE OF RICHARD H. ALLEN & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED OCTOBER 28, 1889.



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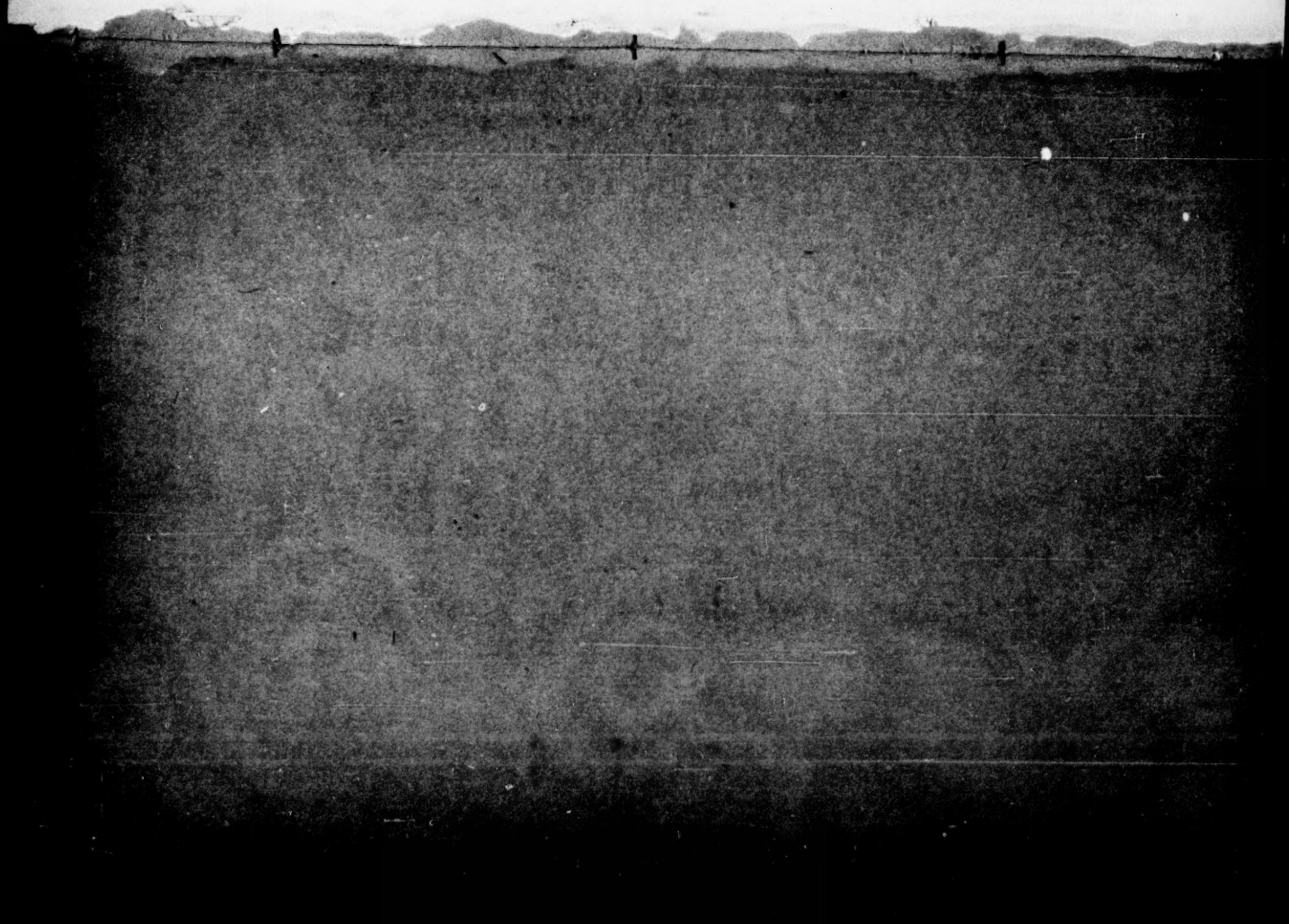
JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 12, 1891.



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1 At a term of the circuit court of the United States for the middle district of Alabama begun and held at Montgomery, Alabama, on the first Monday in November, it being the fifth day of said month, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable John Bruce, one of the judges of said court, presiding.

* * * * * * *

SATURDAY, *January* 19, 1889.

A day of the regular term of said court, the Honorable John Bruce present and presiding, the following proceedings were had as follows, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama, May Term, 1887.

RICHARD H. ALLEN & Co.
vs.
B. S. BIBB & Co. } 644.

Summons & Complaint.

Thos. H. Allen and Thomas H. Allen, Jr., who are each citizens of the State of Tennessee, and Richard H. Allen and Harvy Allen, who are each citizens of the State of New York, and all four of whom are partners doing business together as such under the firm name and style of Richard H. Allen & Co., plaintiffs, claim of the defendants, B. S. Bibb and Thomas H. Hopkins, who are
2 partners doing business together as such under the firm name & style of B. S. Bibb & Co. and who are severally resident citizens of the middle district of Alabama, the sum of twenty thousand and twenty three $\frac{50}{100}$ dollars ($20,023.50), due by defendants to plaintiffs for work and labor done and services rendered by plaintiffs for defendants, at their instance and request, during the month of December, 1886, and a like sum for money paid out and expended by plaintiffs for defendants, at their instance and request, during the said month of December, 1886; which several sums of money, with the interest thereon, are past due and unpaid; and plaintiffs file herewith in the office of the clerk of the United States circuit court for the middle district of Alabama a- account showing the amount and character of said indebtedness, as required by the statutes in such case made and provided.

RICE & WILEY,
Att'ys for Plaintiffs.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon B. S. Bibb and A. H. Hopkins, who are partners doing business under the firm name and style of B. S. Bibb & Co. & who are severally residents citizens of the middle district of the State of Alabama, to appear before the hon. circuit court aforesaid, at the place of holding said
3 circuit, at Montgomery, on the first Monday of May next, to answer the complaint of Thos. H. Allen and Thos. H. Allen, Jr., who are citizens of the State of Tennessee, and Richard H. Allen and Henry Allen, who are each citizens of the State of New York and who together do business under the firm name and style of Richard H. Allen & Co., and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 17th day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

Attest: J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

Received in office this 19th day of February, 1887.
W. W. ALLEN,
U. S. Marshal.

Executed by serving copy of the within summons and complaint on B. S. Bibb and A. H. Hopkins, each of the firm of B. S. Bibb & Co., this 21st day of Feb'y, 1887.
WM. W. ALLEN,
U. S. Marshal.

Issued this 17th day of February, 1887. Returned and filed this 23d day of February, 1887.
J. W. DIMMICK, *Clerk.*
RICE AND WILEY,
Plaintiffs' Att'ys.

4 *Plea of the Def't Bibb.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama, May Term, 1887.

RICHARD H. ALLEN & Co., Plaintiffs,
vs.
B. S. BIBB & Co., Def'ts. } 644.

1st. And the said defendant B. S. Bibb, for answer to the said complaint, says that he did not undertake or promise in manner & form as the plaintiffs have above hereof complained against him.

2d. And the said defendant, for further answer to said complaint, says that the said plaintiffs did not do the work or labor mentioned in the complaint or any part thereof at the instance or request of this defendant or at the instance or request of any one authorized to contract for this defendant in that behalf; and this defendant further says that the said plaintiffs did not pay out the money mentioned in the complaint or any part thereof at the instance or request of this defendant or at the instance or request of any one authorized to contract for this defendant in that behalf.

3d. And for further answer to said complaint this defendant denies each and every statement and allegation in said complaint contained severally and separately.

4th. And the said B. S. Bibb, for further answer to said complaint, says that on, to wit, the first day of January, 1886, a statute theretofore duly enacted by the legislature of the State of New York
5 was in full force and effect in the State of New York, and ever since the first day of January, 1886, said statute has been and is now in full force and effect, and the said statute is in substance as follows: "All wagers, bets, or stakes made to depend upon any race or upon any gaming by lot or chance or upon any lot, chance, casuality, or unknown or contingent event whatever shall be unlawful. All contracts for or on account of any money or property or thing in action so wagered, bet, or stakes shall be void."

And this defendant further says that the work and labor and serving the plaintiffs' complaint mentioned was the making of eleven wagers by the plaintiffs for the said B. S. Bibb & Co., in the city and State of New York, to wit, in the month of November, 1886, and the money paid out and expended by the plaintiffs mentioned in the complaint was money paid out by the said plaintiffs in the city and State of New York on, to wit, on the 30 December, 1876, for and on account of & in settlement of said eleven wagers so made as aforesaid.

5th. And for further answer to said complaint the said defendant B. S. Bibb says that in and by the statute law of the State of New York, which was on the first day of January, 1886, and ever since has been and now is in full force and effect, it is declared and enacted in substance as follows: "All wagers, bets, or stakes made to depend on any race or upon any gaming by lot, chance, casuality, or unknown or contingent event whatever shall be unlawful.
6 All contracts for or on account of any money or property or thing in action so wagered, bet, or staked shall be void." And the said defendant further says that the work and labor & services, in the plaintiffs' complaints mentioned, rendered by the plaintiffs for said B. S. Bibb & Co. was the making of eleven wagers, to wit, in the month of November, 1886, in the city and State of New York, by the said plaintiffs for said B. S. Bibb & Co. on the price of cotton at future times, to wit, in January and February, 1887; and the said defendant further says that the money paid out and expended by the plaintiffs for the defendants, mentioned in the complaint, was money paid out and expended by the plaintiffs in

the city & State of New York on, to wit, the 30th day of December, 1886, for and on account of and in settlement of the said eleven wagers so made by the said plaintiffs aforesaid.

CRAIG & CRAIG & PETTUS,
Att'ys for Def'ts.

Pl'ffs deny each plea & take issue on each plea.

RICE & WILEY,
Att'ys for Pl'ffs.

Filed this 2d May, 1887.

J. W. DIMMICK, *Clerk.*

Affidavit of B. S. Bibb, One of the Defendants.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama, May Term, 1887.

RICHARD H. ALLEN & Co., Plaintiffs,
vs.
B. S. BIBB & Co., Defendants. } 644.

7 THE STATE OF ALABAMA,
Dallas County.

Before me, A. P. Young, a notary public in and for said county, personally appeared B. S. Bibb, one of the defendants in the above-entitled cause, to me well known, who, being duly sworn, deposes and says that, to the best of his knowledge, information, and belief, the account filed with the complaint in the above-entitled case by the plaintiffs with the clerk of said United States circuit court is not correct, and that, to the best of his knowledge, information, and belief, he is not liable for the amount stated to be due on said account so filed as aforesaid.

B. S. BIBB.

Sworn to and subscribed before me on this the 30th day of April, A. D. 1887.

A. P. YOUNG,
Notary Public.

Filed the 2d day of May, A. D. 1887.

J. W. DIMMICK, *Clerk.*

Pleas and Affidavit of T. H. Hopkins.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama, May Term, 1887.

RICHARD H. ALLEN, Plaintiff,
vs.
B. S. BIBB & Co., Defendants. } 644.

1st. And Thomas H. Hopkins, sued in the above-entitled suit by

the name of A. H. Hopkins, for answer to said complaint says that he did not undertake or promise in manner and form as the
8 said plaintiffs have above hereof complained against him, and he makes oath that this plea is true.

2d. And the said Thomas H. Hopkins, sued by the name of A. H. Hopkins, for further answer to said complaint, says that the said plaintiffs did not do the work or labor mentioned in said complaint or any part thereof at the instance or request of this defendant or at the instance or request of any one authorized to contract for this defendant in that behalf, and the said defendant further says that the said plaintiffs did not pay out the money mentioned in the complaint or any part thereof at the instance or request of this defendant or at the instance or request of any one authorized to contract for this defendant in that behalf, and this defendant makes oath that this plea is true.

CRAIG & CRAIG,
E. W. PETTUS,
Att'ys for Defendant.

THE STATE OF ALABAMA, }
Dallas County. }

Before me, Rob't W. Young, a notary public in and for said county, personally comes Thomas H. Hopkins, to *to* me well known, who, being duly sworn, deposes & says that the foregoing pleas numbered on- & two, respectively, are each true in substance and in fact.

THOMAS H. HOPKINS.

Sworn to and subscribed before me this 30th day of April, A. D. 1887.

ROB'T W. YOUNG,
Notary Public, D. C.

Plaintiff- deny each plea & take issue on each plea.

RICE & WILEY,
Att'ys for Pl'ffs.

Filed 2d day May, 1887.

J. W. DIMMICK, *Clerk.*

9 *Demur-er to 6th Plea.*

RICHARD H. ALLEN & Co. }
vs. } 644.
B. S. BIBB & Co. }

The pl'ff*s* demur to the 6th plea filed in this case and assign the following grounds or causes of this demurrer:

1st. Said 6th plea is argumentative & insufficient and shows no fact or facts which avoids the complaint or entitles defendants or either of them to plead the statute alleged in that plea.

2d. Said sixth plea erroneously assumes that this suit is founded on such transaction or contract as the statute therein alleged requires to be in writing or to conform to the alleged provision of that statute.

3d. Said 6th plea professes to answer the whole of said complaint, whereas it contains no answer to make them a part of said complaint.

4th. Said plea does not show any fact or facts which entitles the defendants or either of them to plead the statute therein alleged and as a bar to the complaint in this case.

5th. No transaction or contract is shown in said complaint as in said 6th plea which is within the terms or provisions of the statute alleged in that plea.

6th. Said 6th plea does not show that said settlements mentioned in that plea were unlawful or unauthorized.

RICE & WILEY,
Att'ys for Pl'ffs.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama.

10 *Plea of Def't B. S. Bibb.*

May Term, 1887.

RICHARD H. ALLEN & Co.
vs.
B. S. BIBB & Co. } 644.

And the said defendant B. S. Bibb, for further answer to said complaint, by leave of the court says that said plaintiffs on, to wit, the tenth day of November, 1886, as special agents for this defendant, sold, in the city and State of New York, ten thousand bales of cotton by various contracts, as a speculation and for future delivery in the State of New York, and in making said contracts for this defendant the said plaintiffs, by their gross negligence and unskillfulness, made said contracts in such forms that all of said contracts were, under the laws of the State of New York, unlawful and void and not binding on any one of the parties to said contracts or either of them, in this, that in & by the statute law of the State of New York in force before and at the time when said contracts were made it is declared in substance as follows: "Every contract for the sale of any goods, chattels, or things in action for the price of fifty dollars or more shall be void unless, 1st, a note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby, or, 2d, unless the buyer shall accept and receive a part of such goods or the evidences or some of them of such things in action, or, 3d, unless the buyer shall at the time pay some part of the purchase-money."

And this defendant avers that each one of said contracts so
11 made by the said plaintiffs was for the sale of bales of cotton for the price of more than one hundred dollars; and the defendants further avers that no note or other memorandum of either of said contracts so made by the plaintiffs was made in writing and subscribed by the parties to be charged thereby; and this defendant further avers that the buyer did not accept and receive any part of the bales of cotton sold by said contracts or by any one of said contracts; and the defendant further avers that the buyer did not at the time pay any part of the purchase-money for the cotton so sold by said contracts or by either of them.

And this defendant further avers that the said plaintiffs, to wit, the 30th day of December, 1886, not at the instance or request of this defendant, but voluntarily, settled said void contracts in the city and State of New York, and then and there voluntarily, and not at the instance or request of this defendant, paid to the buyers of said cotton so sold as aforesaid by said plaintiffs large sums of money.

And this defendant further says that without this the said plaintiffs never did do any work or labor for this defendant or render any service to or for this defendant or pay out or expend any money for this defendant.

CRAIG & CRAIG &
E. W. TETTUS,
Att'ys for Def't B. S. Bibb.

Filed by leave of court this 10th day of June, 1887.
J. W. DIMMICK, *Clerk.*

12 "EXHIBIT No. 1."

Motion to Suppress Deposition.

In the United States Circuit Court at Montgomery.

RICHARD H. ALLEN & CO.
vs. } 644.
B. S. BIBB & THOS. H. HOPKINS.

The said defendants severally and separately move the court to suppress the deposition of Richard H. Allen taken in said cause as a witness for plaintiffs by George H. Corey on the grounds following:

1st. For that no commission was issued out of this court or by the clerk thereof authorizing said George H. Corey to take the said deposition of said witness.

2. For that no notice was given to the defendants or either of them or to their attorneys or either of them of the residence of the commissioner to be appointed to take the deposition of said witness.

3d. For that no notice was given to the defendants or either of them or to their attorneys or either of them of the residence of said wit-

ness other than that the said witness resided in the State of New York.

4th. For that no notice was given to the defendants or either of them or their attorneys of record or either of them of the time and place of taking said deposition.

5th. For that no notice was *was* given to defendants or either of them or to their attorneys of record or either of them of the time of taking the said deposition of said witness.

6th. For that no notice was given to the defendants or either of them or to their attorney- of record or either of them of the
13 place where said deposition of said witness was to be taken.

7th. For that no notice was given to said defendants or either of them or to their attorneys of record or either of them of the residence of the said George H. Cory, the commissioner by whom said deposition was taken.

PETTUS & PETTUS &
CRAIG & CRAIG,
Att'ys for Def'ts.

Filed January 10, '89.

J. W. DIMMICK, *Clerk.*

Agreement of Counsel.

In the Circuit Court of the United States for the Middle District of Alabama.

RICHARD H. ALLEN & Co., Pl'ffts,
vs.
B. S. BIBB & Co., Def'ts.

It is hereby agreed that the Honorable John Bruce, the presiding judge in the above-stated cause, may sign a bill of exceptions as to the defendant B. S. Bibb within thirty days from the date of the adjournment of the term of the said court at which said cause was tried, the said bill to be first submitted to counsel for pl'fft.

Jan'y 19th, 1889.

RICE & WILEY,
Att'ys for Pl'fft.
PETTUS & PETTUS &
CRAIG & CRAIG,
Att'ys for Defendants.

Filed this 19th day of January, 1889.

J. W. DIMMICK, *Clerk.*

14 *Agreement as to Bill of Exceptions.*

In the Circuit Court of the United States for the Middle District of Alabama.

RICHARD H. ALLEN & Co.
vs.
B. S. BIBB & THOS. H. HOPKINS, Partners under the Name of B. S. Bibb & Co. } 644.

Agreement of counsel.

In the above-stated case a judgment was *a judgment was* rendered in January, 1889, in favor of the plaintiffs against the defendant B. S. Bibb & in favor of the defendant Hopkins against the plaintiff-. Now it is agreed by said plaintiff- that the time for signing a bill of exceptions for said defendant Bibb in said cause be extended for sixty days from this day, and that the judge who presided on the tryal of said cause may sign a bill of exceptions for said Bibb at any time in sixty days from this day.

This February 23, 1889.

RICE & WILEY,
Att'ys for Plaintiff-.

Filed the 23d day of Feb'y, 1889.

J. W. DIMMICK, *Clerk.*

Judgment Entry.

SATURDAY, *January* 19, 1889.

RICHARD H. ALLEN & Co.
vs.
B. S. BIBB & T. H. HOPKINS. } 644.

This case came on to be further heard this day, and also came the jury heretofore impannelled and sworn, to wit, C. W. Kennedy and eleven others, who, being duly elected, tried, and sworn well and truly to try the issues joined between the parties and a true verdict render according to the evidence, upon their oaths do say:

15 "We, the jury, find for the plaintiffs against the defendant B. S. Bibb and assess the damages at $22,476.38, and we find for the defendant T. H. Hopkins on the ground that we find he was not a partner of B. S. Bibb." Thereupon the defendant B. S. Bibb objected to a judgment being rendered against him on the verdict returned by the jury for the damages assessed because he says the complaint and pleadings and said verdict do not authorize a judgment against the defendant Bibb. The court thereupon overruled said objection and rendered judgment on said verdict against the def't Bibb, and said Bibb excepted separately to the overruling of his objection, and also to the rendition of said judgment. It is therefore considered by the court that said plaintiffs, Richard H. Allen & Co., recover of said defendant, B. S. Bibb, the said sum of

$22,476.38 so assessed by the jury aforesaid and all the costs of this suit except the costs incurred as to said Hopkins, and that as to the costs incurred as to said Hopkins the said Hopkins is hereby entitled to judgment against the plaintiffs. Let execution issue accordingly.

16 *Bill of Exceptions.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama, at Montgomery, in the State of Alabama.

RICHARD H. ALLEN & Co., Plaintiffs,
vs.
B. S. BIBB and THOMAS H. HOPKINS, Sued as Partners under the Name & Style of B. S. Bibb & Co., Defendants. } 644.

Be it remembered that on the 10th day of January, 1889, when this cause was called for trial, the plaintiffs announced that they were ready for trial, and thereupon said defendant, Thomas H. Hopkins, for himself, made an application for a continuance on account of the absence of his witness, Mr. Lacey, and said application was overruled; and thereupon the said defendants severally and separately (and before the trial commenced) made and filed in this case a motion in writing to suppress the deposition of Richard H. Allen taken in this case as a witness for the plaintiffs by George H. Corey, as commissioner; a true copy of said motion is hereto attached and marked "Exhibit 1" to bill of exceptions; and thereupon and before the trial of this suit was commenced the court proceeded to try said motion to suppress said deposition.

And on the trial of said motion the said defendants read as evidence the said deposition of said Richard H. Allen and all the papers thereto attached and the indorsement of publication
17 thereon signed by the clerk of this court, and a true copy of said deposition of said Richard H. Allen and of all the papers thereto attached and of the endorsement of publication thereon is hereto attached as a part of this bill of exceptions and marked at the beginning "Exhibit 2 to bill of exceptions," and marked at the end of said exhibit "The end of Exhibit 2 to bill of exceptions;" and the said plaintiff thereupon read the said endorsement of publication on said deposition in these words: "Published under general order of court entered on May 29th, 1888. J. W. Dimmick, clerk;" and it was also shown by the records of this court that after the 29th day of May, 1888, the May term of this court was in session from time to time until July 18th, 1888, when said May term finally adjourned; and it was also shown that the November term of this court was commenced on the first Monday in November, 1888, and that in the absence of defendants' attorneys the plaintiffs' attorneys set down this case to be called for trial on a certain day in November; that afterwards the attorneys for plaintiffs and defendants met, & by consent this case was set for the 10th day of January, 1889,

and a rule of this court adopted at the November term, 1874, and not since changed was read, and is in the words following: "The modes of proceeding prescribed by the code of Alabama, when
18 they do not conflict with a law of the United States or a rule of the Supreme Court of the United States, are adopted." This was all the evidence offered to the court on the trial of said motion to suppress said deposition, and the court, after considering said motion and said evidence offered on the trial thereof, overruled said motion to suppress said deposition, and the said defendant, B. S. Bibb, then and there excepted to said action of the court overruling said motion.

Thereupon, after said motion to suppress said deposition was overruled, the said Bibb announced that he was ready for trial, and thereupon a jury was called, empannelled, and sworn, and the trial of this cause was commenced, and on trial of this cause the following proceedings were had:

R. D. HASLIP was sworn and examined as a witness for the plaintiffs, and testified in substance as follows:

I was in 1886 and for several years before and am now in the employment of the plaintiffs in this suit, mostly as a travelling agent, soliciting business for the plaintiffs and reporting the condition of the cotton crops. As such agent I went to Selma, in this State, and on the 22d day of October, 1886, I first saw the defendants in Selma. I went that day to their office, in Selma, and asked for Mr. Bibb, but he was not then in the office. I then had a
19 little conversation with Mr. Hopkins, and retired. Later in the day I returned to their office, and found Mr. Bibb there, and introduced myself to him, and told him my business, and that I was agent for Richard H. Allen & Co., of New York, and had called to see if I could get his business in cotton futures contracts for that firm. Mr. Bibb and I talked about that business for a few moments, and then Mr. Bibb called Mr. Hopkins, who was writing at a desk near to us, and Mr. Hopkins came and was introduced to me by Mr. Bibb as his partner. Bibb, Hopkins, & I then had a conversation together about the business of buying and selling cotton for future delivery in New York. Mr. Hopkins took about as much part in that conversation as Bibb did. I finally told them I would write to R. H. Allen & Co., and they would write from New York to B. S. Bibb & Co. I then left their office.

On the 25th day of November, 1886, I was again in Selma for the purpose of seeing B. S. Bibb & Co. about margins on contracts made for them by plaintiffs for sale of cotton for future delivery. It was Thanksgiving day, and I did not find them at their office, but I met Hopkins near the post office and told him that there were then large losses on the contracts for the sale of cotton made for his house, and I had come to see him about putting up margins.
20 He answered that I must see Mr. Bibb; that he had nothing to do with that business. I asked him if Bibb did not

introduce him to me as his partner, and he replied, "He did not. I am not his partner. I am merely his book-keeper."

Later in the day I saw Bibb and talked with him about the contracts and the losses, and asked him for margins up to the market price, but I got no margins.

The plaintiffs, by their attorneys, then produced the Pamphlet Acts of the State of New York, purporting to be published by authority of the State of New York, for the years 1871, 1880, 1881, & 1883, and proposed to read from said Pamphlet Acts for 1871 chapter 365, "An act to incorporate the New York Cotton Exchange," passed April 8th, 1871, as evidence. Thereupon the defendant Bibb objected to said act being read as evidence for plaintiffs, and stated the following grounds of objection:

1st. Because said act is irrelevant to any issue in this cause.

2d. Because the said act is irrelevant and will merely incumber the record in this case.

But the court overruled the said objection of said Bibb; and thereupon said Bibb excepted to the ruling of the court on his said objection; and thereupon said act so proposed to be read was read as evidence for the plaintiffs to the jury.

21 A true copy of said act is in the exhibit to this bill of exception, marked "Charter, By-Laws, and Rules New York Cotton Exchange, 1886, Exhibit No. 3."

Thereupon the plaintiffs proposed to read as evidence from said Pamphlet Acts for the year 1880 chapter 228, passed May 20th, 1880, of which chapter a true copy *in* in the exhibit to this bill of exceptions No. 3 last above mentioned. Thereupon the defendant Bibb objected to the reading of said chapter 228 as evidence to the jury on the ground that it was irrelevant to any issue in the cause; but the court overruled said objection, and said Bibb excepted to this ruling; and thereupon said chapter 228 was read as evidence for the plaintiffs to the jury.

And then the plaintiffs proposed to read as evidence from said Pamphlet Acts for the year 1881 chapter 113, passed April the 19th, 1881, of which chapter 113 a true copy is in the Exhibit No. 3 to this bill of exceptions. Thereupon the defendant Bibb objected to said chapter 113 being read as evidence on the ground that it was irrelevant to any issue in the cause; but the court overruled this objection, and the defendant Bibb excepted to this ruling of the court. Thereupon said chapter 113 was read to the jury as evidence for the plaintiffs.

And the plaintiffs proposed to read as evidence from said Pamphlet Acts for the year 1883 amendments to charter of New York

22 Cotton Exchange, passed by the legislature of the State of New York in 1883. The said "amendments to charter" are correctly copied in said Exhibit No. 3 to this bill of exceptions, and are headed "amendments to charter." Thereupon the defendant Bibb objected to said "amendments to charter" being read as evidence for the plaintiffs, on the ground that said "amendments to charter" were irrelevant evidence; but the court overruled this ob

jection, and thereupon said "amendments to charter" were read as evidence for the plaintiffs to the jury.

The foregoing acts of the legislature of the State of New York, showing the charter of the New York Cotton Exchange, were offered in connection with the evidence hereinafter introduced touching the dealings in cotton by the plaintiffs for defendants in the said New York Cotton Exchange.

The plaintiffs then read as evidence to the jury 16 letters written by Richard H. Allen & Co. in York, addressed to B. S. Bibb & Co., at Selma, Alabama, and also 4 letters written by B. S. Bibb & Co., at Selma, Alabama, and addressed to Richard H. Allen & Co., at New York. Copies of the said sixteen letters from Richard H. Allen & Co. to B. S. Bibb & Co. so read as evidence are hereto attached and marked at the beginning thereof "Exhibit No. 4 to Bill of Exceptions, beginning," and also marked at the end of said letters "Exhibit No. 4, end;" and copies of said four letters from B. S.
23 Bibb & Co. to Richard H. Allen & Co. so read in evidence are hereto attached and marked at beginning "Exhibit No. 5 to Bill of Exceptions, beginning," and also marked at the end of said letters "Exhibit No. 5, end."

The plaintiffs then read as evidence telegrams from Richard H. Allen & Co. to B. S. Bibb & Co., at Selma, and telegrams from B. S. Bibb & Co., at Selma, to Richard H. Allen & Co., at New York. Said telegrams were in cipher, according to Shepperson's Code, but were translated correctly, and as translated were read to the jury as evidence for the plaintiffs. Copies of the said telegrams from Richard H. Allen & Co. to B. S. Bibb & Co. so read in evidence are hereto attached & marked at the beginning "Exhibit No. 6 to Bill of Exceptions, beginning," and marked at the end thereof "Exhibit No. 6, end;" and copies of the said telegrams from B. S. Bibb & Co. to Richard H. Allen & Co. so read in evidence are hereto attached and marked at the beginning "Exhibit No. 7 to Bill of Exceptions, beginning," and also marked at the end thereof "Exhibit No. 7, end."

Jessie Beale was then sworn and examined as a witness for the plaintiffs, and testified in substance as follows: In 1886 I had a broker's office and bucket shop in Selma, but did not give it my personal attention. In September or October, 1886, I heard that B.
24 S. Bibb & Co. had gone into the same business, and I went there to arrange rates with them. When I went into their office Mr. Bibb introduced me to Mr. Hopkins as his partner. Bibb, Hopkins, and I had a short conversation and arranged rates so as to not cut down the rates. Then I made contract with them by which I sold them pork for future delivery, and I then left. I made $100 net on the pork.

Harry Allen was then sworn and examined as a witness for the plaintiffs, and testified in substance as follows: I am one of the plaintiffs in this case, and before the year 1886 and during that year I was a member of the New York Cotton Exchange, and am still a member. When in New York I made the contracts for my firm, R. H. Allen & Co., which were made in the New York Cotton Exchange, and when I am away from New York contracts in said

exchange made for R. H. Allen & Co. are made by a broker who is a member of the exchange, but are signed by one of the other members of my firm, Richard H. Allen, which was and is according to the course of business in the New York Cotton Exchange.

The witness was then asked to examine the "slip contracts" which were attached to the deposition of Richard H. Allen and dated in November, 1886. (The said deposition is attached as an exhibit to this bill of exceptions.) And the witness then examined said "slip contracts" attached to said deposition and dated
25 in November, 1886. Said "slip contracts" are 19 in number, and each marked on the back thereof "Exhibit A, George H. Corey, commissioner," and said 19 "slip contracts" are marked respectively, after the words "Exhibit A," from 1 to 19, inclusive.

Thereupon the plaintiffs' counsel asked said Harry Allen whether that form of slip contracts was or was not according to the then prevailing course of business in the New York Cotton Exchange, and to this question the defendant Bibb then objected on the grounds following:

1st. Because said question is an attempt to prove a tempo-ry custom.

2d. Because the question seeks to prove a custom in New York contrary to the laws of New York. But the court overruled the said objection of the said Bibb, and to this action of the court the said defendant Bibb then and there excepted; and thereupon said question was asked and answered by said Harry Allen as follows:

"Each of said slip contracts was made and signed and delivered in accordance with the then prevailing course of business in the New York Cotton Exchange."

The attorneys for the plaintiffs then asked the witness Harry Allen to read said 19 "slip contracts" to the jury; and thereupon the defendant Bibb objected separately to the reading of each of said contracts as evidence, and stated the following grounds of objection:

26 1st. Because said "slip contracts" were void under the statute of frauds of the State of New York.

2d. Because said contracts did not show who *was* the sellers of the cotton mentioned in said contract.

3d. Because it did not appear from said contracts that the plaintiffs were either the parties to or connected with said "slip contracts" or either of them.

And the said defendant Bibb then proposed to read the statute — frauds of the State of New York in support of said last-named objection, but the court refused to permit the reading of said statute — frauds at that time, and to this refusal the said Bibb then and there excepted.

And the court overruled the objection of the said defendant Bibb to the reading of each of said nineteen "slip contracts" as evidence, and the said Bibb excepted separately to the rulings of the court on his objection to each of said contracts; and thereupon each one of said 19 "slip contracts" was read by said Harry Allen to the jury as evidence for the plaintiffs.

The attorneys for the plaintiffs then asked said witness Harry Allen this question:

"By whom was the cotton mentioned in said 'slip contracts' sold?"

The defendant Bibb objected to this question and stated the following grounds of objection:

1st. For that by the statute law of New York said "slip contracts" were void.

27 2d. For that by the statute — frauds of the State of New York contracts for the future delivery of personal property of the value of over fifty dollars were void unless in writing, subscribed by the party to be charged thereby.

3d. Because the question called for parole evidence of the contents of a writing.

But the court overruled said objection to *to* said question; and thereupon the said Bibb excepted to the said ruling of the court; and thereupon the said witness Harry Allen answered said last-named question as follows:

"Richard H. Allen & Co., by me, sold said cotton mentioned in said 'slip contracts.'"

The said witness Harry Allen further testified in substance as follows:

The orders of B. S. Bibb & Co. read in evidence were sent to me by my firm in the New York Cotton Exchange and I filled the orders to sell, and on the same day the "slip contract-" read in evidence were written and signed by the respective buyers or their brokers as their names now appear on each of said "slip contracts" respectively.

The attorney for plaintiffs then asked said witness as follows:

"When these 'slip contracts' read in evidence were delivered did your firm deliver*er* to the buyers a corresponding contract of sale?"

Thereup- the defendant Bibb objected to that question and stated the following grounds of objection thereto:

1st. Because the question called for parol evidence of the
28 contents of a written contract without accounting for the absence of the writing.

2d. Because the question called for se-ondary evidence.

3d. Because the question sought to connect the said "slip contracts" read in evidence with other contracts not referred to in said "slip contracts."

But the court overruled the last-named objection made by said Bibb, and to this ruling of the court said Bibb then and there excepted; and thereupon said witness answered said question, in substance, as follows: When said "slip contracts" read in evidence were delivered to me I delivered to each buyer respectively a corresponding "contract of sale."

Thereupon the plaintiffs' attorney asked Harry Allen this question: "Was or not the exchange of 'slip contracts' in the form of the nineteen 'slip contracts' read in evidence according to the course of business then prevailing in the New York Cotton Ex-

change?" And to this question the defendant Bibb then and there objected on the grounds following:

1st. For that said question is an attempt to prove a temporary custom.

2d. For that the question seeks to prove a temporary custom or course of business in New York contrary to the laws of New York.

But the court overruled the said objection of the said defendant Bibb, and to this ruling of the court the said defendant Bibb
29 then and there excepted; and said witness Allen then answered said questions as follows: "The exchange of 'slip contracts' in the form of the nineteen 'slip contracts' read in evidence was according to the course of business then prevailing in the New York Cotton Exchange."

And said Harry Allen further testified that the contracts of sale delivered to the buyers by him were on the same form of "slip contracts" as the "slip contracts" read in evidence, and were signed by R. H. Allen & Co. and delivered by witness in the New York Cotton Exchange to the respective buyers and were retained by them, and witness had not seen either one of said contracts of sale so delivered by him since the day on which they were delivered to the buyer.

Said Harry Allen further testified that the book shown him by plaintiffs' attorney and which witness then had in his hand was a printed copy of the "Charter, By-Law-, and Rules of the New York Cotton Exchange." Thereupon the attorney for the plaintiffs proposed to read to the jury as evidence for plaintiffs from the said printed book all after page 10 to the end on page 124. The defendant Bibb objected to the reading from the said book all after page 10 to the end on page 124 on the grounds following:

1st. Because if there was in the matter proposed to be read from said book anything relevant to the issues in this case the plaintiff should be required to point out the relevant parts and offer them as evidence.

30 2d. Because this evidence proposed was irrelevant.

3d. Because the pages from said printed book proposed to be read would uselessly incumber the record.

But the court overruled the last-named objection of said Bibb, and to this ruling of the court said Bibb then and there excepted.

And then all of the said book after page 10 to the end on page 124 was read as evidence for plaintiffs to the jury. That part of said book which is on and before page 10—that is, the charter of the New York Cotton Exchange and the amendments thereto—had been read as evidence from said Pamphlet Acts, as hereinbefore stated. The said printed book so read in evidence is hereto attached as a part of this bill of exceptions and marked "Charter, By-Laws, and Rules New York Cotton Exchange, Exhibit No. 3."

The said witness Harry Allen further testified that another printed book, then in his hand, was commonly called "Shepperson's Code;" that this code was used by plaintiffs and defendants in the telegraphic correspondence read in evidence and in the fictitious names used; and thereupon the plaintiffs proved by said code that

the translations of telegrams read in evidence were correct translations; and the plaintiffs read in evidence from said code the following sentences: "Note: Unless otherwise stated, as agreed, it is distinctly understood that all orders sent by this chapter are to be subject in every respect to the by-laws and rules of the cotton exchange of the market where executed." Page 151. Note:
31 With every telegram sent by this table the following sentence will be read as a part of the message, viz: "This sale has been made subject to all the by-laws and rules of our cotton exchange in reference to contracts for the future delivery of cotton." — 167.

The said Harry Allen further testified that the account of the plaintiffs which was read in evidence and appear in the deposition of the said Richard H. Allen was correct, and that there was no other agreement or understanding between either defendant and the plaintiffs or either of them or between any of the plaintiffs and any of the persons who purchased from the plaintiffs the said ten thousand bales of cotton than such as is shown in said writings, letters, and telegrams read in evidence.

Said Harry Allen further testified that the defendants were in default of margins and failed and refused to furnish any margins, although they were due by the terms of the agreement between the parties before and at and after the time when defendants gave their said orders to *to* buy some twenty-two thousand bales of cotton for future delivery, and that defendants continued in default until the transactions were closed by said purchase to cover on the 30th day of December, 1886, or the day thereafter.

Said Harry Allen further testified that in the latter
32 part of December, 1886, witness went to Selma, Ala., to see B. S. Bibb & Co. about margins on sales of cotton for future delivery made for them; that he then saw defendant Hopkins, but had no conversation with him about business; that witness on that visit saw Bibb several times and had several conversations with him; that witness asked said Bibb for margins on the contract made for B. S. Bibb & Co., but got none; that said B. S. Bibb in these conversations complained that Richard H. Allen & Co. had not carried out his instructions to buy cotton, and claimed damages therefor, and on that ground denied that he was liable to plaintiffs on the contracts they had made for B. S. Bibb & Co.; that witness proposed to Bibb to leave the question as to the liability of B. S. Bibb & Co. on the contracts for the sales of cotton made for them to be decided by any cotton merchant in Selma, but said Bibb refused to do so; that witness asked Bibb for the names of the customers of B. S. Bibb & Co., but Bibb refused to let witness have the names of his customers; that whilst in Selma on that visit witness and said Bibb went together to the office of Judge Geo. H. Craig, who was lawyer for said Bibb, and had a conversation with Judge Craig about the matters involved in this suit, and witness explained that B. S. Bibb & Co. had never put up any margins and had no right to expect our firm to make any more contracts without margins, but Bibb still denied all liability to Allen & Co. on
33 the ground asserted by him that Allen & Co. had refused to

carry out his instructions. Judge Craig refused to give any opinion, and we separated. Afterwards, on the same day, which was the 29th day of December, 1886, I asked B. S. Bibb for instructions about the contracts made for his house by plaintiffs, but he refused to give any instructions. I then told Bibb that I would telegraph my house in New York to close out the contracts they had made for B. S. Bibb & Co. I did send night message that night to R. H. Allen & Co. at New York, advising them that Bibb & Co. refused to give margins or instructions and repudiated their contracts and claimed damages, and advising them to cover all sales made for B. S. Bibb & Co. and fix losses. I left Selma that night for Memphis, where I stayed a week or ten days, and then went on to New York.

The contracts made by R. H. Allen & Co. for B. S. Bibb & Co. were closed on the 30th day of December, 1886, by buying to cover, and the losses on these contracts amounted in the aggregate to $19,273.50, and were paid by R. H. Allen & Co. on the 30th day of December, 1886, and the commissions on the sales made for B. S. Bibb & Co. were $750.00, according to contract price.

34 The said Henry Allen further testified that the contracts to cover the said sales made for the said B. S. Bibb & Co. were all made on the 30th day of December, 1886.

Witness was then asked by the attorney for the plaintiffs to examine the eight "slip contracts" attached to the deposition of Richard H. Allen in this cause and dated December 30th, 1886. Copies of the said eight contracts are attached to the copy of the deposition of said Richard H. Allen, which is attached to this bill of exceptions and marked "Exhibit 2 to bill of exceptions." Each of said eight slip contracts is marked on the back thereof "Exhibit B, George H. Corey, commissioner," and the said eight "slip contracts" are respectively marked on the back after the letter B from 1 to 8, inclusive. Thereupon, after said Harry Allen had examined said eight "slip contracts," he testified that said eight slip contracts wer- the contracts made by the said Richard H. Allen for the firm of R. H. Allen & Co. and in their name to cover the contracts of sale made by said Richard H. Allen & Co. for B. S. Bibb & Co. Plaintiffs' attorney then asked said Allen the question following: Was or not the said eight "slip contracts" according to the course of business then prevailing in the New York Cotton Exchange? And to this question the said defendant Bibb objected on the following grounds:

1st. For that said question is an attempt to prove a temporary custom or course of business.

2d. For that the question seeks to prove a temporary custom or course of business in New York contrary to the laws of New York.

35 But the court overruled the said objection of the said defendant Bibb, and to this ruling of the court the said defendant Bibb then excepted, and the said witness answered the said question as follows: "The said eight 'slip contracts' were according to the then prevailing course of business in the New York

Cotton Exchange." Thereupon said eight slip contracts were read as evidence to the jury for the plaintiffs.

On cross-examination said Harry Allen testified in substance as follows:

I was in Memphis or on the road from Selma to Memphis on the 30th day of Dec'r, 1886, when the contracts for sale of cotton made by R. H. Allen & Co. for B. S. Bibb & Co. were closed out by the contracts to cover, but I know that said contracts were closed on December 30th, 1886, by the contracts to cover. I was not in New York when Richard H. Allen & Co. paid the $19,273.50 for B. S. Bibb & Co., but I know that Richard H. Allen & Co. did pay that amount for B. S. Bibb & Co. in New York on the 30th day of December, 1886. It was paid by Richard H. Allen for our firm, for he was the only member of the firm then in New York. I do not know in what it was paid, whether in checks or money. I cannot say to whom or in what amounts. It was paid to different persons or firms; but I know it was paid. There is no difference between the form of a contract which is a purchase to cover a sale and the form of contract of purchase which is a purchas- for speculation.

36 When the contracts were made in November, 1886, by Allen & Co. for B. S. Bibb & Co. there was in each one of the 19 "slip contracts" (attached to the deposition of Richard H. Allen) opposite to and following the word "buyer" the name of the buyer; but the words around or about the words "seller" in each of said 19 slip contracts were written therein by me afterwards; not as a part of the contract, but as a memoranda from which the bookkeeper of R. H. Allen & Co. could make proper entries on the books. So far as I know B. S. Bibb & Co. were not informed as to the forms of the contracts of sale made for them by Richard H. Allen & Co. until after this suit was commenced. I did testify on a former trial of this case that I did not know of my personal knowledge who paid the losses on the contracts of sale made for Bibb & Co. by Allen & Co., but I investigated the matter, and I am sure that these losses were paid by R. H. Allen & Co.

The defendant Bibb objected to and moved to exclude that part of said answer which is in these words, "and am sure that these losses were paid by R. H. Allen & Co.," on the ground that it was an opinion or belief of the witness, not the statement of a fact; but the court overruled this motion to exclude, and the defendant Bibb then excepted to this ruling of the court.

37 Said Allen further testified that when plaintiffs sold cotton for B. S. Bibb & Co. in November, 1886, no part of said cotton was delivered, nor was any part of the purchase-money paid.

On rebutting examination by the plaintiffs said Harry Allen testified in substance as follows:

I never heard of any objection being made by B. S. Bibb & Co. to the account rendered to them by Richard H. Allen & Co.

That in making the contracts of sale for B. S. Bibb & Co. in November, 1886, there was no agreement or understanding, either ex-

press or otherwise, that the cotton should not be delivered or to that effect.

The attorney for the plaintiffs then asked said witness the question following:

"Will you state whether or not the books of R. H. Allen & Co. showed the closing of said contracts?"

To this question the defendant Bibb objected, and stated the following grounds of objections:

1st. Because the question called for secondary evidence.

2d. Because it called for a conclusion not facts.

3. Because the books of Allen & Co. were not admissible as evidence for plaintiffs.

But the court overruled this objection, and said Bibb then and there excepted to this ruling of court.

And said witness answered that books of R. H. Allen & Co. did show the closing of said contract; and said witness further testified that witness could not have continued to be a member of the New York Cotton Exchange if the losses on the contracts of sale
38 made for Bibb & Co. by Allen & Co. had not been paid; that no one except he be a member of the New York Cotton Exchange can make a contract in that exchange or be a party to a contract there made except in this way: A firm, with one of the members of the exchange for a partner, can sign contracts made for the firm by some other member of the exchange.

That when witness returned to New York, about the 8th or 10 of January, 1887, the contracts of sale made for B. S. Bibb & Co. by Allen & Co. were not outstanding contracts. If they had been so I would have known it.

The rate of interest in the State of New York was shown to be 6 per cent. per annum.

The plaintiffs then proposed to read as evidence the said deposition of R. H. Allen taken by Geo. H. Corey.

Thereupon the defendant Bibb objected to the reading of said deposition on the following grounds:

1st. For that said deposition was not taken in the mode provided by the laws of the United States.

2d. For that no notice was given to the defendant Bibb or his attorneys or either of his attorneys of the time and place when and where said deposition was to be taken.

And on said objection of the defendant Bibb to the reading of the deposition of said Richard H. Allen the same evidence was given to the court as was given for the plaintiffs and defendants on the trial of the motion of the defendants to suppress the deposition of said Richard H. Allen.

39 But the court overruled this objection of the defendant Bibb to the reading of said deposition, and the said Bibb then and there excepted to this ruling of the court.

And the said deposition of Richard H. Allen was then read to the jury as evidence for plaintiffs.

And the plaintiff then rested.

Mr. LACEY was then sworn and examined as a witness for the defendant Hopkins, and he testified that in the fall and winter — 1886 he was telegraphic operator in a room in Selma next door to the office of B. S. Bibb & Co., and he testified to facts tending to show that the defendant Hopkins was not a partner of the defendant Bibb, and tending to show that in 1886 Bibb did business without a partner under the name of B. S. Bibb & Co., and that Hopkins was his book-keeper.

WILLIAM P. ARMSTRONG, sworn and examined as a witness for defendant Hopkins, testified that he was president of the City National Bank of Selma and was such president in 1886, and he testified to facts tending to show that in 1886 the defendant Bibb did business without a partner under the name of B. S. Bibb & Co., and that defendant Hopkins was Bibb's book-keeper and not his partner.

RICHARD M. NELSON was sworn and examined as a witness
39½ for defendant Hopkins, and he testified to facts tending to show that said Hopkins was not in 1886 a partner of B. S. Bibb, but that said Bibb carried on business in Selma in 1886 without a partner under the name of B. S. Bibb & Co., and that Hopkins was merely Bibb's clerk or book-keeper. Witness stated that he was president of the Commercial Bank of Selma in 1886 and ever since.

The defendant THOMAS H. HOPKINS was sworn and examined as a witness for himself, and he testified that he was not at any time in the year 1886 a partner of the defendant B. S. Bibb; that the defendant B. S. Bibb in 1886 did business without a partner under the name of B. S. Bibb & Co., and that said Bibb employed him as his book-keeper and clerk at a salary of $200.00 per month; that witness had no interest in the profits of B. S. Bibb & Co. in any way at any time in 1886.

That he was not introduced by B. S. Bibb to the plaintiff's witness, Mr. Haslip, as his partner; that he was not introduced to Mr. Beale, witness for plaintiffs, by B. S. Bibb as his partner; that he was not in 1886 introduced to any one as the partner of B. S. Bibb or as a member of the firm of B. S. Bibb & Co.; that witness commenced work for B. S. Bibb in September, 1886, as book-keeper and clerk; that under the directions of B. S. Bibb witness wrote letters and telegrams in the name of B. S. Bibb & Co., and signed
40 that name thereto; that B. S. Bibb, under the name of B. S. Bibb & Co., kept an account in 1886 with both of the banks in Selma; that witness never signed any check on either of said banks in the name of B. S. Bibb & Co., but all such checks were signed by B. S. Bibb himself.

On cross-examination said Hopkins testified in substance that witness wrote all the letters and all of the telegrams which had been read in evidence for the plaintiffs in this case and which purported to be signed by B. S. Bibb & Co., and signed the name of B. S. Bibb & Co. to said letters and telegrams; that each one of said

letters and telegrams was written and signed by witness under the direction and instructions of B. S. Bibb.

That the fictitious names used in said telegrams, Winston, Amos, Amanda & Co., were taken from Shepperson Code, and the cipher used in the telegrams was also taken from the same code; that every one of these fictitious names used in said telegrams, so far as witness knew or had any reason to believe, represented B. S. Bibb himself and no other person; that said B. S. Bibb & Co. in October, November, and December, 1886, did have customers in the cotton future business, and witness named three of such customers, and stated that many other persons or firms, whom he named, had promised said Bibb to give him a part of their business in
41 cotton future transactions; that said Bibb, though an educated man, did not write well or easily, and that witness, whilst book-keeping for Bibb, generally wrote his letters and telegrams for him according to Bibb's instructions.

The defendant BENJAJAH S. BIBB was then sworn and examined as a witness for said Hopkins, the other defendant, and testified in substance that in 1886 witness did business in Selma, Alabama, as a broker and dealer in contracts for the future delivery of cotton, grain, meat, and other things; that this business included what is commonly called a "bucket shop;" that witness had no partner in 1886, but did business under the name of B. S. Bibb & Co. without any partner; that the defendant Hopkins was not the partner of witness at any time in 1886; that witness did not introduce said Hopkins to the witness Beale or to the witness Haslip as a partner of himself or as a member of the firm of B. S. Bibb & Co.; that witness did not at any time in 1886 introduce said Hopkins or represent said Hopkins as a partner of witness to any person; that said Hopkins was in 1886 book-keeper and clerk for witness; that witness never heard in what form Richard H. Allen & Co. made the contracts of sale on the orders sent to them by B. S. Bibb & Co. in November, 1886, until after this suit was commenced; that the letters and telegrams which purported to be signed by B. S. Bibb & Co. and which were read as evidence were written & signed by the defendant Hopkins
42 by directions of this witness. On cross-examination by the attorney for the plaintiffs said Bibb testified in substance as follows: There was no other agreement or understanding between witness and the plaintiffs or between him and any of the parties to this suit in relation to any transactions in selling or buying cotton for future delivery than such as is shown in the correspondence and writings between the parties read in evidence in this cause—that is, in the letters and telegrams read in evidence.

The said Bibb further testified that when cotton was sold for future delivery, and afterwards an equal number of bales were bought to cover, this, according to the rules of the New York Cotton Exchange, as witness understood them, closed the first contract. The fictitious names mentioned in the telegrams sent by B. S. Bibb & Co. to R. H. Allen & Co. represented B. S. Bibb & Co. and no one else. I was carrying on business as a broker and also did a "bucket-shop" busi-

ness in 1886. I did have customers in the cotton-future business in November and December, 1886, and witness named four of these customers. I had also promises of customers in the cotton-future business, including most of the best men who engaged in that sort of contracts in Selma, and witness named about ten persons in Selma who, as witness stated, had promised business in cotton-future contracts to B. S. Bibb & Co. I did refuse to name my customers to Mr. Harry Allen when he was in Selma, and I claimed damages for the failure of R. H. Allen & Co. to carry out the orders of B. S. Bibb & Co.

43 And I refused to give him any instructions, and I told him I was not liable to R. H. Allen & Co. on account of the contracts made on orders of B. S. Bibb & Co. Mr. Harry Allen did tell me in Selma that there were large losses on the contracts, and that he intended to telegraph his firm and have the contracts closed out.

And the defendant B. S. Bibb read in evidence from the 3d volume of the Revised Statutes of the State of New York, 7th edition, which purports on its face to be published by authority of the State of New York, the following section, namely, section 8, on pag- 1962: All wagers, bets, or stakes made to depend on any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property or thing in action so wagered, bet, or staked shall be void. Section 3, on page 2328: Every contract for the sale of any goods, chattels, or things in action for the price of fifty dollars or more shall be void unless—

1st. A note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby; or,

2d. Unless the buyer shall accept and receive part of such goods or the evidences or some of them of such things in action; or,

3d. Unless the buyer shall at the time pay some part of the purchase-money.

44 The plaintiffs objected to the introduction of the several provisions of the statutes of New York which were read in evidence by the defendants, or either of them, on the ground that they were irrelevant, and said several statutory provisions were read in evidence subject to said objection of the plaintiffs and the ruling of the court thereon.

The foregoing is in substance all the evidence in the cause. The trial commenced on the 10th day of January, 1889, and continued from day to day (Sundays excepted) until the 18th day of January, 1889, when, the arguments having closed, the court charged the jury, and in said charge, after the court had instructed the jury that there was no evidence in the case upon which a verdict for the defendant Bibb could rest, on the ground that the contract sued on was a gambling contract and therefore void, the court, among other things, said: The defendant Bibb did not in his testimony deny the correctness of the account sued on, but did say that the plaintiffs were liable to him for their failure to execute his subsequent orders to them to sell, for future delivery, some twenty-two

thousand bales of cotton, as shown in the evidence in this cause; but, *their* being no claims by him in this suit against the plaintiffs on account of such failure to execute such orders, "I charge
45 you that if you believe the evidence you should find a verdict for the plaintiffs against the defendant Bibb for the amount of the account and interest." To this charge the defendant Bibb, by his attorney, excepted then and there in the presence of the jury and before the jury retired.

The jury then, on the 18th day of January, 1889, retired to consider of their verdict.

And afterwards, on the 19th day of January, 1889, before they had agreed upon a verdict, the jury came into open court and asked three several questions, which were answered by the court, and, among other things, the court charged:

I charge you, as matters of law, that you have no right to find a verdict otherwise than upon the evidence in the case and you have no right to disbelieve the testimony of the witnesses in the case except for good reason, for the law assumes that sworn witnesses speak the truth.

This case is made out as to defendant B. S. Bibb, and it is your duty to find a verdict against him for the account sued on and interest. And to this last part of the above charge, commencing with the words "This case is made out," the defendant Bibb, by his attorney, then and there excepted in open court and in the presence of the jury and before the jury retired. Then the jury again retired and returned into court on January 19th, 1889, and returned a verdict in words and figures as following:

46 "We, the jury, find for the plaintiffs against the defendant Bibb and assess the damages at $22,476.38, and we find for the defendant T. H. Hopkins on the ground that we find he was not a partner of B. S. Bibb.

C. W. KENNEDY, *Foreman.*

And thereupon the defendant B. S. Bibb objected to a judgment being rendered against him on the verdict returned by the jury for the damages assessed, because he says the complaint and pleading and said verdict do not authorize a judgment against the defendant Bibb.

The court thereupon overruled said objection, and the said defendant Bibb then and there excepted to this ruling of the court; and this bill of exceptions of the said defendant B. S. Bibb is signed and sealed by the presiding judge of said court now, as and for the 19th day of January, 1889, and as of the term of said court at which said trial was had.

Given under the hand and seal of the presiding judge of said court, at his chambers, in the city of Montgomery, this the 30th day of April, A. D. 1889.

JOHN BRUCE, *Judge.* [SEAL.]

47 EXHIBIT 1 TO BILL OF EXCEPTIONS.

In the Circuit Court at Montgomery, Alabama.

RICHARD H. ALLEN & CO.
vs.
B. S. BIBB & THOS. H. HOPKINS.

The said defendants severally and separately move the court to suppress the deposition of Richard H. Allen taken in said cause as a witness for the plaintiffs by George H. Corey on the grounds following:

1st. For that no commission was issued out of this court or by the clerk thereof authorizing said George H. Corey to take the deposition of said witness.

2d. For that no notice was given the defendants or either of them or to their att'ys or either of them of the residence of the commissioner to be appointed to take the deposition of said witness.

3d. For that no notice was given to the defendants or either of them or to their attorneys or either of them of the residence of said witness other than that the said witness resided in the State of New York.

4th. For that no notice was given the defendants or either of them or their attorneys of record or of either of them of the time and place of taking said deposition.

5th. For that no notice was given to the defendants or either of them or to their attorneys of record or either of them of the time of taking said deposition of said witness.

6th. For that no notice was given to the defendants or of either of them or to their attorneys of record or either of them of
48 the place where said deposition of said witness was to be taken.

7th. For that no notice was given to said defendants or either of them or to their attorneys of record or either of them of the residence of the said George H. Cory, the commissioner by whom said deposition was taken.

PETTUS & PETTUS,
CRAIG & CRAIG,
Attorneys for Defendants.

Filed January 10th, 1889.

J. W. DIMMICK, *Clerk.*

Exhibit 2 to Bill of Exceptions.

Ints. to Rich'd H. Allen.

In the Circuit Court of the United States for the Middle District of Alabama.

Richard H. Allen & Co.
vs.
B. S. Bibb and Thomas H. Hopkins, Late Partners, Doing Business under the Firm Name and Style of B. S. Bibb and Co.

Interrogatories to be propounded to Richard H. Allen, whose office and place of business is at 31 and 33 Broad street, in the city of New York and State of New York, who is a resident citizen of the State of New York, is one of the plaintiffs, and is a material and importan- witness in behalf of the plaintiffs, and whos- deposition when taken upon these interrogatories will be read in evidence on the trial of the above-entitled cause:

1st. First interrogatory. How old are you; where do you re-
49 side, and what is your business or occupation at this time, and what during the month- of October, November, and December, 1886? State whether or not at this time and during the months enquired about hereinabove you are and were a member of the firm of Richard H. Allen & Co. Have you thus been continuously *been* a member of said firm since October, 1886? If you answer affirmatively, state what was the business or occupation of the plaintiffs during the months inquired about hereinabove, and continuously ever since up to this time. If you say the plaintiffs were then and are now bankers, brokers, and commission merchants, state whether or not, as such, the plaintiffs ever had any business dealings or transactions with the defendants or either of them; and, if yea, what. Answer as fully and particularly as if specially interrogated in ref/erence thereto. As a member of the firm of Richard H. Allen & Co., state what your duties principally were and are. State also whether or not you are personally acquainted with the defendants or either of them. If not so acquainted personally, what particular part did you have in these business transactions with them or either of them. State what was the character of the business transactions which the plaintiffs had with the defendants and when the same occurred. State in reference to the matters as fully and particularly as if specially interrogated touching the same.

2d. Second interrogatory. If the plaintiffs paid out or expended
50 any money for or on account of said defendants to any person or persons whomsoever growing out of any of said business transactions by and between plaintiffs and defendants, please state with particularity when, w-ere, and what sums of money were thus paid out and expended, by whom paid, to whom paid, for whom paid, and on what account paid. Answer as fully and particularly as if specially interrogated in reference to this matter.

3d. Third interrogatory. Look upon the verified statement or memorandum hereto attached of the indebtedness of defendants to plaintiffs in account with Richard H. Allen & Co. of cotton sold through plaintiffs in New York by order and for account of defendant-, and state whether or not the same is true and correct. Answer fully and particularly. Of said amount state how much was for commission- due to your firm (pl'ff-) on account of these sales and cotton transactions and whether or not the plaintiffs have paid the loss sustained by defendants by reason of these cotton transactions. If said account is not just, true, and correct and explicit, then append to your answers to these interrogatories and as a part of your depositions a full, true, and correct account of the defendants' indebtedness to plaintiffs, including the commissions which defendants may be due to plaintiffs on account of cotton sales and services rendered for defendants in and about said transactions, and also including a statement of all moneys paid out and expended by plaintiffs for defendant- on these transactions. State in this connection, and fully and particularly, everything you know which will benefit the plaintiffs, in all respects as if specially interrogated touching the matters here inquired about.

RICE & WILEY,
Att'ys for Pl'ffs, Rich'd Allen & Co.

51 *Verified Account.*

Mess. B. S. Bibb & Co., Selma, Ala., in account with Rich'd H. Allen & Co., New York.

1886.				
Dec. 30.	To net loss	1,000	Jan'y,	ac. "Albert"	2,190 00
" "	" " "	1,000	"	" "Alexander"	2,190 00
" "	" " "	500	"	" "Andrew"	1,095 00
" "	" " "	1,000	Febr'y,	" "Alfred"	2,280 00
" "	" " "	1,500	Jan'y,	" "Winston"	3,082 50
" "	" " "	1,000	"	" "Edith"	1,906 50
" "	" " "	1,000	"	" "Edgar"	1,951 50
" "	" " "	500	"	" "Edmond"	1,000 50
" "	" " "	1,000	"	" "Amanda"	1,695 00
" "	" " "	1,000	"	" "Ambrose"	1,740 00
" "	" " "	500	"	" "Amos"	892 50
					20,023 50

CITY AND COUNTY OF NEW YORK, *ss:*

Harry Allen, being duly sworn, doth depose and say that the foregoing account is, to the best of his knowledge, information, and belief, true and correct.

HARRY ALLEN.

Sworn to before me this 10th day of Feb'y, 1887.
GEORG McCRANE,
Notary Public, Kings County.

Certif. filed in N. Y. Co.

Account sales 500 bales cotton, January delivery, through Richard H. Allen & Co., New York, by order and for account of Messr. Bibb & Co., Selma, Ala., ac. Amos.

Nov. 12.	Sold 500 Jan'y @	9 13	
Dec. 30.	Bo't 500 " "	9 51	
		38×5 190 | 100	855 00
	Commission		37 50
	Net loss		892 50

E. E. New York, Dec. 30, 1886.

RICH'D H. ALLEN & Co.,
Per WALLER.

52 Account sales 1,000 bales cotton, January delivery, throug- Richard H. Allen & Co., New York, by order & for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Ambrose.

Nov. 12.	Sold 1,000 Jan'y @	9 13	
Dec. 30.	Bo't 1,000 " "	9 50	
		37×10 370 | 100	1,665 00
	Commission		75 00
	Net loss		1,740 00

E. E. New York, Dec. 30th, 1886.

RICH'D H. ALLEN & CO.,
Per WALLER.

Account sales 1,000 bales cotton, January delivery, through Richard H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Amanda.

Nov. 12.	Sold 1,000 Jan'y @	9 13	
Dec. 30.	Bo't 1,000 " "	9 49	
		36×10 360	1,620 00
	Commission		75 00
	Net loss		1,695 00

E. E. New York, Dec. 30, 1886.

RICHARD H. ALLEN & CO.,
Per WALLER.

53 Account sales 500 bales cotton, January delivery, through Richard H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Edmond.

Nov. 12.	Sold	400	Jan'y	@	9 06		
" 12.	"	100	"	@	9 07		
Dec. 30.	Bo't	500	"	"	9 49		
						214 | 100	963 00
	Commission						37 50
	Net loss						1,000 50

E. E. New York, Dec. 30, 1886.

RICHARD H. ALLEN & Co.,
Per WALLER.

Account sales 1,000 bales cotton, January delivery, through Richard H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Edgar.

Nov. 12.	Sold	700	Jan'y	@	9 06	2 94	
" " "		300	"	"	9 07	1 23	
Dec. 31.	Bo't	1,000	"	"	9 48		
						4 17 | 100	1,876 50
	Commission						75 00
	Net loss						1,951 50

E. E. New York, Dec. 30, 1886.

RICHARD H. ALLEN & CO.,
Per WALLER.

54 Account sales 1,000 bales, January delivery, through Richard H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Edith.

Nov. 12.	Sold	700	Jan'y	@	9 06	2 87	
" "		300	"	"	9 07	1 20	
Dec. 30.	Bo't	1,000	"	"	9 47		
						4 07 | 100	1,831 50
	Commission						75 00
	Net loss						1,906 50

E. E. New York, Dec. 30, 1886.

RICHARD H. ALL-N & CO.,
Per WALLER.

Act. sales 1,500 bales cotton, January delivery, through Richard H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Winston.

Nov. 11.	Sold 1,000 Jan'y @	9 03	4 40		
" " "	500 " "	9 02	2 20		
Dec. 30.	Bo't 1,000 Jan'y @	9 47			
" " "	500 " "	9 46			
			6 60 | 100		2,970 00
	Commissions				112 50
	Net loss				3,082 50

E. E. New York, Dec. —, 1886.

RICHARD H. ALLEN & CO.,
Per WALLER.

55 Account sales 1,000 bales cotton, February delivery, through Richard H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Alfred.

Nov. 10.	Sold 1,000 bales Feb'y	9 09		
Dec. 30.	Bo't 1,000 " "	9 58		
		49×10	490 | 100	2,205 00
	Commissions			75 00
	Net loss			2,280 00

E. E. New York, Dec. 30, 1886.

RICHARD H. ALLEN & CO.,
Per WALLER.

Account sales 500 bales cotton, January delivery, through Richard H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Andrew.

Nov. 10.	Sold 500 Jan'y @	8 99		
Dec. 30.	Bo't 500 " "	9 46		
		47×5	235 | 100	1,057 50
	Commissions			37 50
	Net loss			1,095 00

E. E. New York, Dec. 30, 1886.

RICHARD H. ALLEN & CO.,
Per WALLER.

56 Account sales 1,000 bales cotton, January delivery, through Rich'd H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Alexander.

Nov. 10.	Sold 1,000 Jan'y @	8 99		
Dec. 30.	Bo't 1,000 " "	9 46		
		47×10=470 | 100	2,115	00
	Commissions		75	00
	Net loss		2,190	00

E. E. New York, Dec. 30, 1886.

RICHARD H. ALLEN & CO.,
Per WALLER.

Account sales 1,000 bales cotton, January delivery, through Rich'd H. Allen & Co., New York, by order and for account of Mess. B. S. Bibb & Co., Selma, Ala., ac. Albert.

Nov. 10.	Sold 1,000 January	8 99		
Dec. 30.	Bo't 1,000 "	9 46		
		47×10 470 | 100	2,115	00
	Commission		75	
	Net loss		2,190	00

E. E. New York, Dec. 30, 1886.

RICHARD H. ALLEN & CO.,
P'r WALLER.

Filed in office Feb. 17, 1887.

J. W. DIMMICK, *Clerk.*

57 In the Circuit Court of the United States for the Middle District of Alabama.

RICHARD H. ALLEN & Co.
vs.
B. S. BIBB & Co.

Before me, Benj. P. Seals, dep. clerk U. S. cir. court, mid. dist. of Alabama, & U. S. commissioner for said district, personally appeared Sam'l F. Rice, known to me, who, being duly sworn, deposes and says on oath that he is of counsel for plaintiffs in the afore-entitle- cause; that Richard H. Allen, to whom the foregoing interrogatories have been propounded as a witness, is one of the plaintiffs and is a resident citizen of the State of New York and a non-resident of the State of Alabama and resides more than one hundred miles from the city of Montgomery, the place of trial of said cause, computed by the usual route of travel; that said Richard H. Allen is a material and important witness for the plaintiffs in said cause, and that this affidavit is made for the purpose of having the depositions of said witness taken in behalf of the plaintiffs under and

upon the foregoing interrogatories hereto attached in the manner prescribed by the statute in such case made and provided.

SAM'L F. RICE.

Sworn to and subscribed before me this the 4th day of April, A. D. 1888.

BENJ. P. SEALS,
Dep. Clerk U. S. Cir. Court, Mid. Dist. of Alabama, & U. S. Commissioner for said Dist.

58 To B. S. Bibb & Co., defendants in the above-entitled cause, as well as to their attorneys of record, Craig & Craig & Pettus:

You are hereby notified that the foregoing interrogatories have been filed in the office of the clerk of the circuit court of the United States for the middle district of Alabama, and that after the expiration of ten days from and after said interrogatories or a copy thereof shall have been served upon said defendants or their said attorneys a commission to take the deposition of said witness, Richard H. Allen, who resides in the State of New York and whose office and place of business is at 31 & 33 Broad street, in the city of New York, — under said interrogatories & commission, and that George H. Corey, whose residence is in New York and whose place of business is at 60 Wall street, in the city of New York, will be suggested to said clerk as a proper person to be appointed commissioner to take said deposition.

RICE & WILEY,
Att'ys for Plaintiffs, Richard H. Allen & Co.

Issued this 5th day of April, 1888.

[SEAL.] Witness Hon. Sam'l F. Miller, *chief* justice of the Supreme Court of the United States.

J. W. DIMMICK, *Clerk.*

[Endorsed:] U. S. cir. court, mid. dist. of Ala. Filed in office Ap'l 4th, 1888. J. W. Dimmick, clerk.

59 No. 448.

Received in office this 5th day of April, 1888.
W. W. ALLEN,
U. S. Marshal.

Executed by handing copy of the within interrogatories to B. S. Bibb, of the firm of B. S. B. & Co.
April 7th, 1888.
W. W. ALLEN,
U. S. Marshal.
L. L. GADDY, *Deputy.*

644.

RICHARD H. ALLEN & Co.
vs.
B. S. BIBB & Co.

Interrogatories to be propounded to Rich'd H. Allen, a material witnes- for plaintiffs.

Geo. H. Cory, Esqr., who is a resident citizen of New York and *and* whose place of business & office is at 60 Wall St., New York city, is suggested as commissioner.

RICE & WILEY,
Att'ys for Pl'ft.

Filed in office Ap'l 4, 1888.
J. W. DIMMICK, *Clerk.*

R. H. ALLEN & Co.
vs.
B. S. BIBB & Co. } # 644.

Objections of B. S. Bibb to Commission Being Issued to Take Deposition of R. H. Allen & Cross-Int'g's.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama.

RICHARD H. ALLEN & Co., Plaintiffs,
vs.
B. S. BIBB & THOS. H. HOPKINS.

The defendant B. S. Bibb objects to a commission being issued to take the deposition of Richard H. Allen on interrogatories filed by the plaintiff- in the above-stated cause on the grounds following:

1st. For that no affidavit was made for taking this deposition of said witness.

60 2d. For that no sufficient affidavit was made stating any lawful ground for taking the deposition of said witness.

3d. For that no notice had been given to this defendant of the residence of said witness.

4th. For that no sufficient notice has been given to this defendant of the residence of said Rich'd H. Allen.

5th. For that no notice has been given to this defendant of the residence of said witness, stating at what place in the State of New York said witness resided.

6th. For that no notice has been given to this defendant of the residence of said George H. Corey, the commissioner suggested by the plaintiffs to be appointed to take said deposition.

7th. For that no sufficient notice of the residence of said George H. Corey has been given to this defendant.

8th. For that no notice has been given to this defendant of the place in the State of New York where said George H. Corey resided.

CRAIG & CRAIG &
E. W. PETTUS,
Att'ys for Def't B. S. Bibb.

And this said defendant, B. S. Bibb, without waiving the foregoing objections or either one of them, propounded to said RICHARD H. ALLEN, witness for the plaintiffs, the following cross-interrogatories:

1st cross-interrogatory. Are you a member of the New York Cotton Exchange; if so, when did you become a member?

2nd. Second cross-int'r'y. If you say that the plaintiff- sold
61 cotton for B. S. Bibb & Co., state whether the contracts for which the cotton was sold *was* verbal or in writing; if in writing, please *please* attach to your answer such written contract or contents by which cotton was sold by the plaintiffs for or on account

of or at the request of B. S. Bibb or B. S. Bibb & Co. Did you make said contracts or either of them or were you present when they were made or when either one of them *were* made?

3d. Third cross-int'r'y. Are you personally acquainted with the defendants or either of them? Did you ever see either of them?

4th. Fourth cross-inter'y. Who wer- the members of the firm of Richard H. Allen & Co., in New York, in 1886? In what business was that firm engaged in in the fall, 1866? Did that firm, in 1886, buy or sell cotton for future delivery on their own account? Was that firm interested on their own account in the purchase or sale of cotton for future delivery at any time in the fall of 1886? If yea, on which side were they interested?

CRAIG & CRAIG & E. W. PETTUS,
For B. S. *B. S.* BIBB.

Filed the 16th day of Ap'l, 1888.

J. W. DIMMICK, *Clerk.*

Commission to Take Deposition.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

To George H. Corey, Esq., No. 60 Wall street, New York *abt.:*

62 Know ye that we, having full faith in your prudence and competency, have appointed you commissioners, and by these presents do authorize you at such time and place as you may appoint to call before you and examine Richard H. Allen, who resides in the State of New York and whose office and place of business is at 31 & 33 Broad street, in the city of New York, as witness in behalf of plaintiffs in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein Rich'd H. Allen & Co. are plaintiffs and B. S. Bibb & Co. defendants, on oath to be by you administered, upon interrogatories & cross-interrogatories annexed to this commission; to take and certify the deposition of the witness, and return the same to our said circuit court with all convenient speed under your hand & seal.

Witness Hon. Sam'l F. Miller, *chief* justice of the Supreme Court of the United States, this 18 day of April, A. D. one thousand eight hundred and eighty-eight.

Issued the 18th day of April, 1888.

J. W. DIMMICK,
Clerk U. S. Cir. Court, Mid. Dist. of Ala.

Directions.

1. If the time and place of executing the commission are not named therein the commissioner will subpœna the witnesses to appear before *them* at such time and place as *they* may appoint and administer the oath to witnesses.

2d. Either the commissioner, witness, or some impartial person must reduce the answers of witnesses to writing as near as
63 may in the language of the witnesses.

3d. The heading or title of the deposition should be in this form:

"Deposition of A. B., witness sworn (or affirmed) and examined under & by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein pending, between C. D., plaintiff, and E. F., defendant.

A. B., of * * * being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

"1st. To the first interrogatory he sayeth:

"2d. To the second interrogatory he saith:

"1st. To the first cross-interrogatory he saith:"

When the deposition is finished it must be subscribed by the witness (witness' name), A—— B——, and certified as follows:

"We, the commissioner- (if all act, or I, if one of the commissioner-, as the case may be) in said commission named, do hereby certify that the evidence of the witness, A. B., was taken down under oath and subscribed by him in our presence on the — day of ——, 187–, at ——, in the county of ——, State of ——, and that we have personal knowledge of the witness, or (if unacquainted with the witness) that proof has been made before us of the personal identity of said witness, and that we are (or I am) not of counsel in the cause or of kin to any of the parties in interest or in any manner interested in the result thereof."

Witness our hands and seals (or my hand and seal).

"G—— H——, [SEAL].
"L—— K——, [SEAL.]
"*Commissioners.*"

64 4. The commissioners will fold the commission, interrogatories, answers, and any document deposed to by the witness in a packet, sealed; they will write their name- across the seals and direct it thus:

C. D.
vs.
E. F.

Witness for the plaintiff (or defendant).

To J. W. Dimmick, Esqr., clerk of the circuit court of the United States, middle district of Alabama, Montgomery, Alabama.

The package may be sent by mail or private conveyance. If sent by mail on back take receipt of P. M. thus: Received this package of G. H., commissioner, to be forwarded by due course of mail.

Date, ——.

E. G., *Postmaster.*

EXHIBIT A 1. Geo. H. Corey, Commissioner.

New York, Nov. 10, 1886.

B 10, ac. Albert.
10 " Alexander.
5 " Andrew.
Seller, —— ——.
Buyer, Zerega & White.
On contract, subject to rules and regulations of New York Cotton Exchange.
Twenty-five hundred bales cotton.
Jan. 1 delivery.
Price, 8.99.
× Per Z. & White, seventy-five.

EXHIBIT A 2. George H. Corey, Commissioner.

New York, Nov. 10, 1886.

Seller, B, ac. Alfred.
Buyer, Zerega & White.
On contract, subject to rules and regulations of New York Cotton Exchange.
Ten hundred bales cotton.
Feb'y 1 delivery.
Price, 9.09.
× Per Z. & White, ten.

65 EXHIBIT A 3. Geo. H. Corey, Commissioner.

New York, Nov. 11, 1886.

Seller, B, ac. Winston.
Sand.
Buyer, Lehman Bros.
On contract, subject to rules and regulations of New York Cotton Exchange.
Five hundred bales cotton.
Jan'y delivery.
Price, 9.02.
× Per Lehman Bros., five.

EXHIBIT A 4. Geo. H. Corey, Commissioner.

New York, Nov. 11, 1886.

Seller, B, ac. Winston.
Hay.
Buyer, C. L. Greene & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
One hundred bales cotton.
Jan'y delivery.
Price, 9.03.
× Per C. L. Greene & Co. Wall, for.

EXHIBIT A 5. Geo. H. Corey, Commissioner.

New York, No. 11, 188–.

Seller, B, ac. Winston.
E. A. & W.
Lehman.
Merritt.
Buyer, Dittman & Ulfelder.
On contract, subject to rules and regulations of New York Cotton Exchange.
One hundred bales cotton.
Jan'y delivery.
Price, 9.03.
× Per Deltemonen, one.

EXHIBIT A 6. Geo. H. Corey, Commissioner.

New York, Nov. 11, 1886.

Seller, B, ac. Winston.
Gumams.

Buyer, L. De Gumams.
On contract, subject to rules and regulations of New York Cotton Exchange.
One hundred bales cotton.
Jan'y delivery.
Price, 9.03.
Per Gumams.

66 EXHIBIT A 7. Geo. H. Corey, Commissioner.

New York, Nov. 11, 1886.
Seller, B, ac. Winston.
Rich.
Buyer, C. E. Rich.
On contract, subject to rules and regulations of New York Cotton Exchange.
Two hundred bales cotton.
Jan'y delivery.
Price, 9.03.
× Per C. E. Rich. Clem., 200.

EXHIBIT A 8. Geo. H. Corey, Commissioner.

New York, Nov. 11, 1886.
Seller, B, ac. Winston.
Inman.
Buyer, Inman, Swan & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
Five hundred bales cotton.
Jan'y delivery.
Price, 9.03.
× Per J. Inman & Co., five.

EXHIBIT A 9. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
300, ac. Edith.
Seller, B, 300, ac. Edgar.
Schiffer.
Buyer, Woodward & Stillman.
On contract, subject to rules and regulations of New York Cotton Exchange.
Six hundred bales cotton.
Jan'y delivery.
Price, 9.07.
× Per Woodward & Stillman, P. L., six.

EXHIBIT A 10. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
700, ac. Edith.
Seller, B, 400, ac. Edgar.
Sondhimer.
Buyer, Lehman Bros.
On contract, subject to rules and regulations of New York Cotton Exchange.
— hundred bales cotton.
Jan'y delivery.
Price, 9.06.
× Per Lehman Bros., eleven.

67 EXHIBIT A 11. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
Seller, B, ac. Edgar.
T. & W.
Buyer, Tuttle & Wakefield.
On contract, subject to rules and regulations of New York Cotton Exchange.
One hundred bales cotton.
Jan'y delivery.
Price, 9.06.
× Per Tuttle & W., one.

EXHIBIT A 12. George H. Corey, Commissioner.

New York, —— —, 188-.
Seller, B, ac. Edgar.

Buyer, R. Seidenburg & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
One hundred bales cotton.
Jan'y delivery.
Price, 9.06.
× Per R. Seidenburg & Co, one.

EXHIBIT A 13. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
100, ac. Edgar.
Seller, 400, Edmond.

Schroeder.
Buyer, G. Schroeder & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
Five hundred bales cotton.
Jan'y delivery.
Price, 9.06.
× Per G. Schroeder & Co., W. G. B., five.

EXHIBIT No. 14. George H. Corey, Commissioner.

New York, Nov. 12, 1886.

Seller, B, ac. Edmond.
Heely.
Brown.
Buyer, T. M. Robinson & Co.
On contract, subject to rules and regulations of ——.
One hundred bales cotton.
Jan'y delivery.
Price, 9.07.
× Per J. M. Robinson & Co., C. K.

68 EXHIBIT A 15. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
Seller, B, ac. Amanda.
Meyer.
Buyer, V. & A. Meyer & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
Five hundred bales cotton.
Jan'y delivery.
Price, 9.13.
× Per V. & A. Meyer & Co., five.

EXHIBIT A 16. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
Seller, B, ac. Amanda.

Buyer, H. M. & W. Le Count.
On contract, subject to rules and regulations of New York Cotton Exchange.
Five hundred bales cotton.
Jan'y delivery.
Price, 9.13.
× Per Le Count, five.

EXHIBIT A 17. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
Seller, B, ac. Ambrose.
King.
Buyer, W. V. King.
On contract, subject to rules and regulations of New York Cotton Exchange.
Five hundred bales cotton.
Jan'y delivery.
Price, 9.13.
× Per W. V. King, five.

EXHIBIT A 18. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
Seller, B, ac. Ambrose.
Baum.
Buyer, M. Baum.
On contract, subject to rules and regulations of New York Cotton Exchange.
Five hundred bales cotton.
Jan'y delivery.
Price, 9.13.
× Per M, Baum, Ambrose.

69 EXHIBIT A 19. Geo. H. Corey, Commissioner.

New York, Nov. 12, 1886.
Seller, B, ac. Amos.

Buyer, —— ——.
On contract, subject to rules and regulations of New York Cotton Exchange.
Five hundred bales cotton.
Jan'y delivery.
Price, 9.13.
Per Walter & Fatman, five.

EXHIBIT B 8. Geo. H. Corey, Commissioner.

New York, Dec'r 30, 1886.
Seller, V. & A. Meyer.
√ Alfred (of 10).
Buyer, B. & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
(800) eight hundred bales cotton.
Feb'y delivery.
Price, 9.58.
Per V. & A. Meyer, eight.

EXHIBIT B 7. Geo. H. Corey, Commissioner.

New York, Dec. 3, 1886.
Seller, J. B. Guest.
√ Amos.
Buyer, B. & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
500 *hundred* bales cotton.
Jan'y delivery.
Price, 9.51.
Per × J. B. Guest (500).

EXHIBIT B 6. Geo. H. Corey, Commissioner.

New York, Dec. 30, 1886.
Seller, J. B. Guest.
√ Ambrose.
Buyer, B. & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
1,000 *hundred* bales cotton.
Jan'y delivery.
Price, 9.50.
Per × J. B. Guest (1,000).

70 EXHIBIT B 5. Geo. H. Corey, Commissioner.

New York, Dec. 30, 1886.
Seller, J. B. Guest.
√ Edmond.
10 Amanda.
Buyer, B. & Co. √
On contract, subject to rules and regulations of New York Cotton Exchange.
1,500 *hundred* bales cotton.
Jan'ry deliver-.
Price, 9.49.
Per × J. B. Guest (1,500).

EXHIBIT B 4. Geo. H. Corey, Commissioner.

New York, Dec. 30, 1886.
Seller, J. B. Guest.
√ Edgar.

Buyer, —— ——.
On contract, subject to rules ond regulations of New York Cotton Exchange.
1,000 *hundred* bales cotton.
Jan'y delivery.
Price, 9.48.
Per J. B. Guest (1,000).

EXHIBIT B 3. Geo. H. Corey, Commissioner.

New York, Dec. 30, 1886.

Seller, J. B. Guest.
√ 10 Winston.
√ 10 Edith.
Buyer, B. & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
2,000 bales cotton.
Jan'y delivery.
Price, 9.43.
Per × J. B. Guest (2,000).

EXHIBIT B 2. Geo. H. Corey, Commissioner.

New York, Dec. 30, 1886.
Le Count.
Seller, H. M. & W. Le Count.

Buyer, B. & Co.
On contract, subject to rules and regulations of New York Cotton Exchange.
200 *hundred* bales cotton.
Feb'y delivery.
Price, 9.58.
× Per Le Count, two.

71 EXHIBIT B 1. Geo. H. Corey, Commissioner.

New York, Dec. 30, 1886.
Seller, J. B. Guest.
√ 10 Albert.
√ 10 Alexander.
√ 5 Andrew.
Buyer, —— ——.
√ 5 Winston.
On contract, subject to rules and regulations of New York Cotton Exchange.
3,000 bales cotton.
Jan'y delivery.
Price, 9.46.
Per J. B. Guest (3,000).

Deposition of Richard H. Allen, sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending, between Richard H. Allen & Company, plaintiffs, and B. S. Bibb & Co., defendants.

RICHARD H. ALLEN, of Pelham Manor, State of New York, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1st. As to first interrogatory he saith: I am about 36 years of age; I reside at Pelham Manor, Westchester county, New York; my business is that of banker, broker, & commission merchant. It was the same in October, November, and December, 1886. I am now a member of the firm of Richard H. Allen & Co. I
72 was a member of said firm in October, 1886, and have been continuously a member of said firm from October, 1886, up to the present time.

The business of said firm in October, November, and December, 1886, was that of bankers, brokers, and commission merchants. It has been such continuously from that time up to the present time and is now. As brokers and commission merchants, Richard H. Allen & Co., the plaintiffs, had business dealings with B. S. Bibb & Co., the defendants, in 1886, on orders from defendants to them. As brokers, the plaintiffs, in 1886, on orders from the defendants, sold cotton for the account of the defendants for their customers, as set forth in the orders from defendants to plaintiffs, to wit, by order of and for the account of the defendants, B. S. Bibb & Co. Richard H. Allen & Co., the plaintiffs, as brokers and as members of the New York Cotton Exchange, sold cotton for the defendants, for delivery in January and February, and executed contracts for the same on the floor of the New York Cotton Exchange, as follows, to wit:

Nov. 10, 1886, to Zerega & White, for "Albert," 1,000 B. C., January delivery.

Nov. 10, 1886, to Zerega & White, for "Alexander," 1,000 B. C., January delivery.

Nov. 10, 1886, to Zerega & White, for "Andrew," 500 B. C., January delivery.

Nov. 10, 1886, to Zerega & White, for "Alfred," 1,000 B. C., February delivery.

Nov. 11, 1886, to Lehman Bros., -or " Winston," 500 B. C., Jan'y delivery.

Nov. 11, 1886, to C. L. Green & Co., for " Winston," 100 B. C., January delivery.

Nov. 11, 1886, to Dittman & Ulfelder, for " Winston," 100 B. C., January delivery.

Nov. 11th, 1886, to L. De Gumams, for " Winston," 100 B. C., January delivery.

73 Nov. 11, 1886, to C. E. Rich, for " Winston," 200 B. C., January delivery.

Nov. 11, 1886, to Inman, Swan & Co., for "Winston," 500 B. C., January delivery.

Nov. 12, 1886, to Woodward & Stillman, for "Edith," 300 B. C., January delivery.

Nov. 12, 1886, to Woodward & Stillman, for "Edgar," 300 B. C., January delivery.

Nov. 12, 1886, to Lehman Bros., for "Edith," 700 B. C., January delivery.

Nov. 12, 1886, to Lehman Bros., for "Edgar," 400 B. C., January delivery.

Nov. 12, 1886, to Tuttle & Wakefield, for "Edgar," 100 B. C., January delivery.

Nov. 12, 1886, to R. Seidenburg, for "Edgar," 100 B. C., January delivery.

Nov. 12, 1886, to G. Schroeder & Co., for "Edgar," 100 B. C., January delivery.

Nov. 12, 1886, to G. Schroeder & Co., for "Edmond," 400 B. C., January delivery.

Nov. 12, 1886, to T. M. Robinson & Co., for "Edmond," 100 B. C., January delivery.

Nov. 12, 1886, to V. & A. Meyer & Co., for "Amanda," 500 B. C. January delivery.

Nov. 12, 1886, to H. M. & W. Le Count, for "Amanda," 500 B. C., January delivery.

Nov. 12, 1886, to W. V. King, for "Ambrose," 500 B. C., January delivery.

Nov. 12, 1886, to M. Baum, for "Ambrose," 500 B. C., January delivery.

Nov. 12, 1886, to Walter & Fatman, for "Amos," 500 B. C., January delivery.

All of said cotton was sold by Richard H. Allen & Co. at the New York Cotton Exchange, for account of B. S. Bibb & Co., for the several parties named, on the orders and at the request of B. S. Bibb & Co. The sales were made by Harry Allen, a member of the firm of Richard H. Allen & Co., and the contracts were duly executed for the sale of said cotton by said Harry Allen for said firm. The contracts were in printed form, filled in with writing, and the transactions were made under and subject to the rules of the New York Cotton Exchange. The contracts signed by said Harry Allen for said firm were retained by the parties to whom the cotton was sold. The parties to whom said cotton was sold signed contracts or contract, in the same form and terms as those signed by Richard H. Allen
74 & Co., in the presence of Harry Allen, which were retained by said Richard H. Allen & Co., and those signed by said parties to whom said cotton was sold are attached by me to this deposition as a part thereof and marked Exhibit "A" 1 to 19, inclusive, George H. Corey, commissioner, and to them reference is made. The prices at which said cotton was sold are set out in said contracts attached hereto.

Those contracts signed by Richard H. Allen & Co. and delivered to the parties to whom said cotton was sold are in the possession of

those parties and cannot therefore be by me attached hereto, but they are in form and terms the same as those attached hereto.

At the time of signing such contracts each party to the contracts signed and each retains one signed by the other. The terms of said sales and contracts were under and subject to the rules and regulations of the New York Cotton Exchange. As members of the New York Cotton Exchange and subject to the rules of said exchange, Richard H. Allen & Co. made all these transactions as a member of the firm of Rich'd H. Allen & Co. My duties were not confined or restricted to any one part of the business. I took part in and attend- to all the business that might come to my hand. I did not, however, attend at the exchange.

When not absent from the city, Harry Allen attended at the exchange and executed the orders on the floor for Richard H. Allen & Co.; in his absence, I attended to and
75 transacted such business through brokers on the cotton exchange floors. I had special charge of the office and the accounts and of the correspondence of Richard H. Allen & Co. I am not personally acquainted with the defendants, nor with either of them. The particular part I had in the sales of said cotton was that I received the orders sent them to the exchange for execution, reported them by wire and by mail, and conducted the correspondence with defendants. I attended to the office work connected with them. The arrangements with the defendants for the transacting of the business were made by me by correspondence. This correspondence shows the relations fully and the understandings and agreements as to the manner of conducting the business. After the said cotton had been sold by the plaintiffs on the order and for the account of said defendants, the said defendants failed to carry out the agreements made by them with the plaintiffs, and, having failed to protect said cotton in accordance with said agreement with the plaintiffs and having failed to provide the cotton for delivery upon the said contracts made for their account and by their orders, Richard H. Allen & Co. then, in order to carry out and perform the said contracts that they had entered into, as they were bound to do and for which they were liable under the rules of the New York
76 Cotton Exchange, entered the market in accordance with the said rules of said exchange and bought the following cotton with which to perform the said contracts of sale, to wit:

Dec. 30, 1886, of V. & A. Meyer & Co., for "Alfred," 800 B. C., February delivery.

Dec. 30, 1886, of J. B. Guest, for "Amos," 500 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for "Ambrose," 1,000 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for "Edmond," 500 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for "Amanda," 1,000 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for "Edgar," 1,000 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for " Winston," 1,000 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for " Edith," 1,000 B. C., January delivery.

Dec. 30, 1886, of H. M. & W. Le Count, for "Alfred," 200 B. C., February delivery.

Dec. 30, 1886, of J. B. Guest, for " Albert," 1,000 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for "Alexander," 1,000 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for "Andrew," 500 B. C., January delivery.

Dec. 30, 1886, of J. B. Guest, for " Winston," 500 B. C., January delivery.

All of said cotton was bought by Richard H. Allen & Co. for account B. S. Bibb & Co., under the rules of the New York Cotton Exchange, on the floor of said exchange, by order of Rich'd H. Allen & Co. to their brokers, and the contracts for said cotton were under and subject to the rules of said exchange. The contracts were signed by me in the name of Richard H. Allen & Co. and delivered to the parties of whom the cotton was bought. Said parties of whom said cotton was bought also signed contracts for said cotton in my presence, which were delivered to my firm.

The said contracts signed by my firm and those signed by the parties of whom the cotton was bought were in printed form,
77 filled in by writing, were in form and terms the same and were executed and entered into under the rules of said exchange. Those retained by my firm are attached to this deposition and made a part thereof and marked Exhibit " B " 1 to 8, inclusive, George H. Corey, commissioner, and to them reference is made. These contracts show the prices at which said cotton was bought. The contracts that were signed by my firm and retained by the parties of whom the cotton was bought cannot be attached to this deposition for the reason that they are not in the possession of my firm, but are held by the parties to whom they belong. In signing co-tracts for cotton in the said exchange the rule and custom is for each party to make out a contract for the transaction, and each party signs the contract held by the other. The two contracts are in form and terms the same in all respects, and one is retained by the buyer of the cotton and the other by the seller. In the purchase of this cotton my firm signed the contracts as buyers of the cotton, and the parties of whom it was bought signed them as sellers. The purchases above named were attended to and the contracts were signed by me for my firm. The correspondence in connection therewith was conducted by me for my firm. The above is, as fully and particularly as I can give it, the character of the business had by Richard H. Allen & Co. from B. S. Bibb & Co.

78 Second. As to the 2d interrogatory he saith: The plaintiffs, Richard H. Allen & Co., did pay out, expend, and advance in the fall and winter, 1886, money for and on account of defendants, B. S. Bibb & Co., growing out of said sales of cotton for

delivery in January and February, which contracts were made by the plaintiffs by order on account of and at the request of said defendants. Said money so paid out, expended, and advanced by the plaintiffs was the loss resulting from the transactions made for the defendants by the plaintiffs. Defendants having failed to protect said sales of cotton, and having also failed to provide the cotton for delivery on the said contracts in order to perform said contracts and discharge their liability upon them under the rules of the New York Cotton Exchange, the plaintiffs were obliged to buy the cotton and to discharge the loss. The money expended, paid out, and advanced by the plaintiffs for the defendants was paid at the office of Richard H. Allen & Co., in the city of New York, at 31 & 33 Broad street, in said city, and the money paid out was the loss arising out of the sales of said cotton for account of defendants, as is fully set out in the accounts of sales rendered by the plaintiffs to the defendants, which accounts of sales also include the commissions due the plaintiffs by the defendants for their labor in the said transactions. The money was paid by

79 Richard H. Allen & Co. in the regular and ordinary course of business, and it was paid by them to the parties with whom and against whom they held the contracts made and held by them for the account of B. S. Bibb & Co., and it was paid for account of B. S. Bibb & Co. for their customers. It was paid and advanced by Richard H. Allen & Co. to settle the contracts arising out of the said transactions with B. S. Bibb & Co. The account sales for the said sales of cotton for defendants are attached hereto and to them reference is made. The sums of money paid out and advanced by Richard H. Allen & Co. were in regular order of business directed paid by me. They were paid to the parties with whom and against whom we held the contracts, and I made the payments in the regular way, under the rules of the exchange.

Third. As to the 3d interrogatory he saith: I have examined the verified statements of the account of B. S. Bibb & Co. with Rich'd H. Allen & Co. hereto attached. It is a statement of the account of the defendant with the plaintiffs. It represents the losses made by the defendants on the cotton sold by plaintiffs by order of and for the account of the defendants. It represents the sums paid, advanced, and expended by the plaintiffs for account of said defendants. It is a true and correct statement of the account — the said defendants with the said plaintiffs. The sum total of the same is $20,023.50, which sum includes the commissions due the plaintiffs.

80 The said sum total of $20,023.50 is due the plaintiffs by the said defendants; no part of said sum has been paid by said defendants. There are no offsets nor credits, and the said sum of $20,023.50 is due now, was due on the 30th day of December, 1886, and is still unpaid. The sum of seven hundred and fifty dollars, included in the total sum of $20,023.50 due the plaintiffs, is the amount — commissions due plaintiffs. The account as stated is just, true, and correct.

Cross-interrogatories.

First. As to the 1st cross-interrogatory he saith: I am not a member of the New York Cotton Exchange; my partner, Harry Allen, is a member of the New York Cotton Exchange; he is the exchange member of the firm of Richard H. Allen & Co., and the firm is by reason of his membership in the exchange a member of the New York Cotton Exchange.

Second. As to the 2d cross-interrogatory he saith: The contracts for the sale of the cotton for account of B. S. Bibb & Co. were made under and subject to the rules of the New York Cotton Exchange, and said contracts were in writing in form prescribed by said rules, and were signed by my firm and by the parties to whom the sales were made. Those signed by my firm were retained by the buyers of said cotton and those signed by the buyers of said cotton were delivered to my firm. I have attached to my examination-in-chief the contracts that were signed by the buyers of said cotton, which were delivered
81 to my firm at the time of sale of said cotton. I cannot attach the contracts signed by my firm, who sold the cotton and who signed them at the time, for the reason that they are not in my possession, and were retained at the time by the buyers of said cotton and belong to them. I did not make said contracts of sale of said cotton, and I was not present at the time they were signed; but they were made by my firm for and on account of and at the request of B. S. Bibb & Co., and the orders for the sale of said cotton were received by me at the office of my firm and sent to the exchange, to Harry Allen, to be executed. They were made by Harry Allen, a member of the firm of Rich'd H. Allen & Co. and a member of the New York Cotton Exchange in the name of Richard H. Allen & Co., in the regular course of business, under the rules of the New York Cotton Exchange, and the buyers of said cotton signed the contracts in his presence, and the firm of Richard H. Allen & Co. holds the said contracts in writing so signed by the same buyers. The said contracts of sale were in due course covered, by which I mean that the cotton to perform them being not provided by B. S. Bibb & Co., Richard H. Allen & Co. bought the *the* cotton for January and February delivery with which to perform said contracts of sale. The contracts bought to cover and perform the sales were bought by Richard H. Allen & Co., and I attended to these transactions
82 in the regular course of business, through brokers. Said contracts for the purchase by Richard H. Allen & Co. were in writing under and subject to the rules of the New York Cotton Exchange. I, for my firm, the buyer of the cotton in this instance, signed the contract- in the name of my firm, that were retained by the parties who sold the cotton to my firm, and these parties signed the contracts that were delivered to Richard H. Allen & Co., and said contracts were signed in my presence and are attached to my examination-in-chief. Both those signed by my firm as purchasers and by the other parties as sellers were alike in form and in terms. I was present when these contracts were made & signed.

Third. As to the 3d cross-interrogatory he saith: I am not personally acquainted with the defendants nor with either of them. I have never seen either of them. My acquaintance with them is through correspondence with them and through the business relationship established between them and the plaintiffs.

4. As to the fourth cross-interrogatores he saith: The members of the firm of Richard H. Allen & Co. in New York, 1886, were Thomas H. Allen and Thomas H. Allen, Jr., residing at Memphis, Tennessee; Harry Allen, residing in New York city, and Richard H. Allen, residing at Pelham Mannor, New York. The firm of Richard H. Allen & Co. were engaged in the business a-
83 bankers, brokers, and commission merchants in 1886. In 1886 the firm of Richard H. Allen & Co. did buy and sell cotton for future delivery on margin for a commission, and the cotton bought and sold for future delivery was bought and sold in the New York Cotton Exchange for their customers on their own account and for which they became liable. The interest the firm of Richard H. Allen & Co. had in cotton in 1886 was, as above stated, for their customers in all the cotton that they bought and sold on exchange for future delivery, the contracts were all made in the name of the said firm, and the said firm were liable on all of them, both bought and sold. In the fall of 1886 the said firm had cotton in this way on both sides of the market.

RICHARD H. ALLEN.

I, the commissioner in said commission named, do hereby certify that the evidence of the witness Richard H. Allen was taken down under oath and subscribed by him in my presence on the 17th day of May, 1888, at my office, in the city of New York, county of New York, State of New York, and that I have personal knowledge of said witness, and that I am not of counsel in the cause or of kin to any of the parties in interest or in any manner interested in the result thereof.

Witness my hand and seal.

GEO. H. COREY,
Commissioner. [SEAL].

Published under general order of court entered on May 29th, 1888.

J. W. DIMMICK, *Clerk.*

The end of Exhibit 2 to bill of exceptions.

84 EXHIBIT No. 4 TO BILL OF EXCEPTIONS.

Beginning.

1.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Oct.* 26, 1886.

Mess. B. S. Bibb & Co., Selma, Ala.

DEAR SIR: Mr. Haslip, who represents us, write- that you have a large business in cotton contracts with New York and may send a share of your orders to us. We beg to say that your orders will have our best care and we shall be glad to have them. He says you spoke of terms, but he did not report what you desired in this respect. Our regular terms are $10.00 per 100 bales, commissions and margins of $2.00 per bale. We -hall be pleased to have you write us and state what arrangements you wish to make, and we shall be glad to meet your views if it be in any way possible for us to do so. If the business be large and made safe we will be the better prepared to meet you. Cotton has but few friends at present. It seems to be impossible to get an advance on it. The price is now getting down to a point where it must attract some attention. If it decline any more it will be safe to buy; in fact, it is approaching that point now, though we are inclined to the belief that it may go somewhat lower yet.

Yours truly, RICHARD H. ALLEN & CO.

85 2.

A | 11 | 6 | '88.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 3, 1886.

Mess. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: Yours of the 29th ult. is at hand to-day and is fully noted. We are willing to try the arrangement you propose at the rate you say. If the business be large and you are careful about doing it with only good people there ought to be no doubt about their responding to calls when made and thus making the business safe. At so low a rate it ought to be carefully done with good people.

It must be understood, if a call for margin is not responded to promptly there is to be no carrying on our part, but that the cotton is to be closed out at our discretion.

Yours truly, RICHARD H. ALLEN & CO.

3.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 9, 1886.

Mess. B. S. Bibb & Co., Selma., Ala.

DEAR SIRS: Yours of the 6th inst. is at hand to-day and is carefully noted. We have the 1881 code of Shepperson, and will use in writing your. We shall not solicit any one in Selma for orders desired so long as we have your business; but of course you will cover the entire town. As to keeping you well posted, we can
86 only say that what we may at any time write you can be no more than and opinion and impressions of what we see and hear. We shall give you these for what they are worth, but we lay no claim to a superior knowledge. The turn of yesterday could grow into a permanent reaction by a new buying interest coming in and creating a speculative activity and thus frightening the shorts into covering; but the opening this morning showed the absence of that sort of support, and in consequence the market eased off again. It does not have the appearance of being yet ready for permanent advance. Cotton is too cheap and must go up at no distant day. When it does begin it will be excited, and the advance may not culminate till rather high prices are reached.

Your- truly, RICHARD H. ALLEN & CO.

Address all communication- to our street & number.

4.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 10*th*, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: Your night message of the 9th inst. came duly this morning to us. When the Nat. Cot. Exchange report came out we at once wired you of it. This was not so favorable as to yield as was expected. It was expected that the bureau would give figures
87 as to yield, but they gave only *only* the condition of the crop. This report was not as favorable as was believed it would be. It reduces the condition several points below that of October. We wired you at once the substance of the report. Your order was, "If bureau report is considered favorable." We did not consider it a favorable report; gave it to you and asked you which we should do. We await your reply. The roon expected a report as to yield, and when it came only as to condition they were for the time in confusion. It was not as favorable as they hoped it would be. The market has been firm at the advance all day till at this writing, when it has eased off a few points.

Yours truly, RICHARD H. ALLEN & CO.

5.

Richard H. Allen & Co., 31 & 33 Broad St.

NEW YORK, *Nov.* 10, 1886.

Messrs. B. S. Bibbs & Co., Selma, Ala.

DEAR SIRS: Your telegram of this date is at hand at the close of the market. We at once, as directed therein, executed the orders which come to us to-day to be executed if the bureau report was favorable, and sold for you 1,000 B. C., Jan'y delivery, for account of Albert, at 8.99; 1,000 B. C., Jan'y delivery, for account of Alexander, at 8.99; 500 B. C., Jan'y delivery, for account of Andrew, 8.99; 1,000 B. C., Feb'y delivery, for account of Alfred, at 9.09, making a total of 2,500 B. C., Jan'y delivery, at 8.99, and 1,000 B. C., Feb'y, at
88 9.09. We wired you at once of it and now confirm the telegram. Despite the unfavorable reports from both sources of authority to-day the sentiment there is so well defined against an advance that under free openings of cotton the market eased off.

Yours truly, RICHARD H. ALLEN & CO.

Address all communications to our street & number.

6.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.; Richard H. Allen, Harry Allen, member N. Y. Cotton Exchange, New York.

Thos H. Allen & Co., cotton factors, Memphis, Tenn. Thos. H. Allen, Thos. H. Allen, Jr., Memphis, Tenn.

NEW YORK, *Nov.* 11, 1886 *188*.

Mess. B. S. Bibbs & Co., Selma, Ala.

DEAR SIR-: We are in receipt of your night message 10th inst., and, as desired, have sold for your account and risk 1,500 bales cotton January delivery, as stated below, and telegraphed you, which we now confirm; 1,000 B. C., Jan'y, at 9.03, for Winston, and 500 B. C., Jan'y, at 9.02, for Winston. Liverpool came in better than expected to-day, but we did not send them much encouragement in return. Much will depend upon the course of Liverpool in the next few days. If the minimum crop estimates are accepted, then there can be no other course of prices than an upward one, we think.

Yours truly, RICHARD H. ALLEN & CO.

7.

89 Richard H. Allen & Co., bankers, 31 & 33 Broad St. Richard H. Allen, Harry Allen, members N. Y. Cotton Exchange, New York.

Thos. H. Allen & Co., cotton factors, Memphis, Tenn. Thos. H. Allen, Thos. H. Allen, Jr., Memphis, Tenn.

NEW YORK, *Nov.* 12, 1886 *188*.

DEAR SIR: We are in receipt of your night message of the 11th

inst., and, as desired, have sold for your account and risk 2,500 bales of cotton, Jan'y delivery, as stated below, & telegraph you, which we now confirm.

700 B. C., Jan'y, for Edith, at nine six (906);
300 B. C., Jan'y, for Edith, at nine seven (907);
700 B. C., Jan'y, for Edgar, at nine six (906);
500 B. C., Jan'y, for Edgar, at nine seven (907);
400 B. C., Jan'y, for Edmond, at nine six (906);
100 B. C., Jan'y, for Edmond, at nine seven (907),

making a total of 1,800 B. C., January, at nine six (906), and a total of 700 B. C., Jan'y, at nine seven (907). At the opening there was a good demand and the market was firm. The market is in a state of anxious expectation. It seems to be on the eve of a reaction. It will be well to give it close attention and switch to the other side if it continues to have strength.

Yours truly, RICH'D H. ALLEN & CO.

Address all communications to our street & number.

8.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 12, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: Your telegram of this date is at hand in due
90 course. We executed the orders therein and wired you of same, and now beg to say that we, as directed, sold for your account 2,500, Jan'y, as follows, at nine thirteen: 1,000 B. C., Jan'y delivery, for Amanda, at nine thirteen (913); 1,000 B. C., Jan'y delivery, for Ambrose, at nine thirteen (913); 500 B. C., Jan'y delivery, for Amos, at nine thirteen (913). Prior to the execution of this order we wired you to send us margin of $3,800.00, and in our last asked it to be made $4,200.00 instead, the loss having been run up to that sum There is a great change of sentiment on cotton here to-day. It is now very bullish. The shorts will begin to come as soon as it begins to rise in earnest, and then we expect a rapid advance. Our opinion is that the turn has come at last, and what we have previously written has now a prospect of being realized. We await your prompt reply to our call, and remain,

Yours truly, RICHARD H. ALLEN & CO.

9.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 13, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: Yours of the 10th inst. by mail is at hand to-day after the close. All the telegrams we have sent you have been put by us in the Mutual Union office, and all ought to have gone to you

in the way you desired, having been sent just that way. We
91 assumed you used the line most convenient to you, and we used *and we used* the same one you did. All your orders have been promptly executed, and we hope you have got quick advice, for we have made it a point to wire you quickly. From what we see around us we think speculation is taking hold of cotton, and that some of the shorts are getting covered as well as possible without much ado about it. The market closed to-night very strong, and will no doubt have an invigorating effect upon Liverpool on Monday.

Are all of your friends of one way of thinking on cotton at present?

Are there no bulls in the number? It is well to get some on one side and some on the other, if possible. Our endeavor shall be to serve you efficiently, and if you find any delay in advise notify us, that we may see where the fault is.

Your- truly, RICHARD H. ALLEN & CO.

10.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 13, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: Your two telegrams of yesterday afternoon came in after the close of business for the day. If our messages to — yesterday conveyed to your minds that we felt any uneasiness they did what was not intended by us. We felt very strongly that the turn
92 had come, and that when a general covering began, which did not appear to be far off, the market then would rise rapidly. As it would be possible to put out shorts at very much higher prices if an advance continued, we deemed it proper to let you know how we felt on the market. It is always more comfortable to have customers make money than to loose it, and we simply wished to have you advised of the tone and feeling here on yesterday. Our telegrams were in your interest and to put you in what we thought was in the right channel by getting your customers on the side that then appeared to be the side for profit. We regret we created an impression we did not seek to make. To show that we had no uneasiness we went on and executed your orders and sold as directed, even though we held the opposite views. In the rush of yesterday we see we omitted to state the price we sold the last 2,500 January at in our telegram. It was at 9.13, as was stated in our letter of yesterday. Liverpool simply met our advance yesterday. Our market had halted, and a slight reaction may be expected. Many of the shorts who run quickly covered yesterday. If the advance continues the larger shorts may be frightened into covering, too.

Yours truly, RICHARD H. ALLEN & CO.

Address all communications to our street & number.

93 11.

Richard H. Allen & Co., bankers, 31 & 33 Broad street.

NEW YORK, *Nov.* 15, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: We have nothing from you to-day. We supposed we might hear from you to-day with a check for margin, but it is possible it was too soon to expect it. It will doubtless be in the morning mail. The market took another upward movement to-day and closed strong. On the closing prices your contracts show a loss of $9,258.50. Before the close we wired you to send us margin to the market. We did not know the sum you sent in response to our previous call, so you can now send enough to bring the contracts to the market. This is a bull market for the present, and we believe it is going higher. We wrote you what we thought of it, and gave you also the news by wire. To-day we saw no new feature to wire you, so we did not wire, as it would have been but repeating what we had said before. If some of your friends would take the bull side for a turn you might get some of them to make a little money. We cannot advise a selling policy on this market yet. When it gets tired it would do to go short, but it will then be at much higher prices than now. Awaiting response to our calls for margin, we are,

Yours truly, RICHARD H. ALLEN & CO.

94 12.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov. 16th*, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: On the 15 inst. we wired you to send us margin, and got your reply by wire that you would send us the margin asked for. If sent on the 13th should have come in on yesterday, but by all means to-day. There was no remittance from you this morning, and we wired you in regard to it, and asked you to reply. No reply has come yet, nor has any remittance come in the mails since this morning. It is now 2 p. m. We do not understand the delay, for you said you would remit, nor do we understand why we have no reply to our telegram of this morning. We wired you also to-day the cause of the decline in Liverpool. That market is at about last night's prices now. Our market is dull but firm. There is a halt in it, but it appears to us to be but a stop to the breathing space. We think this is a bull market on the merits of the situation, and if there is no war or other bad news it will go much higher. The signs all point that way now to us. We cannot carry you for so large a loss, and request you to send us the margin as called for. Your prompt attention in this will oblige,

Yours truly, RICHARD H. ALLEN & CO.

95 13.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 16, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: Your telegram of this date is at hand this afternoon just before the close. The limit you fix is at the moment impracticable. Before it came in we had wired you again in regard to the margin we had asked you to provide. It seems to us strange that we have no reply from you to-day to our telegram of this morning, and more strange that if you remitted the margin as you wired us you would do how it is it has not yet reached us. We have expected a reply from you to our message of to-day, and as it did not come we wired again for fear that it may not have reached you in due season. Before going further we shall be glad to have the previous matter arranged and fully explained. We carried your contracts to a big loss before calling you, and the loss grew larger after we called. When we make a call we expect a prompt response. We have waited to hear from you and still hope it had attention, and that the delay may prove not to have been your fault.

Yours truly, RICHARD H. ALLEN & CO.

Address all communications to our street and number.

96 14.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 19, 1886.

Messrs. Bibb & Co., Selma, Ala.

DEAR SIRS: Your telegram of the 18th inst. came in yesterday afternoon; was noted, and we replied at once by wire. We have executed for you the orders you have sent to us taken by you for your customers, as per your telegraphic orders designating them by code names, and now have open for the accounts as designated a large number of B. C. Our advices duly gave the number of B. C. and prices. This cotton shows a large loss. The loss has been greater than it is at this moment, and we have repeatedly asked you to send us margin to the market on the cotton. In reply to our first calls you *you* wired us you would remit the margin we asked for. Relying upon what you said you would do, we waited for the margin to come in. In the meantime the loss grew much larger. In due course, when the margin promised should have reached us, we were surprised to find that what you said you would do was not complied with. We have wired you often in regard to it and as often requested you to send us margin to the market.

But to this writing no margin has come, and till the mes-
97 sage yesterday we got no reply from you about —, when, much to our disappointment, we find you did not remit, nor do you give us any information in respect to it. The cotton showed a big loss before we called you at all. Your agreement was to re-

mit when called; that you took orders only in regular course from good customers; that it should be safely done; that we were not to do any packing, &c. In response — our question asking if you had margin from your customers you advised us that the customers were all right, and that there was no cause for uneasiness. Now, if this be so, we do not understand why you do not get from the customers for whom the orders were made the margin at once to the market and send it in. If the cotton is for good people and they are all right, as we were led to suppose they are, there can surely *can* be no difficulty in going to them and getting the margin required to bring the cotton to the market. If this cannot be done, then the business is not such as was proposed, and is not so safe as it was reputed to be. Thus we were led to ask you to give us the names of the parties for whom the orders were taken, and we could then see what we could do towards getting the margin. The reply you made by wire yesterday, and this is the only one we have had in relation to the matter, is not at all satisfactory to us. It
98 does not give us any answer to our questions and is not what we expected or wanted. Contracts cannot be carried on faith alone, and when calls are made and not responded to there is no satisfaction in asking for patience unless the request be prefer-ed with an assurance that the call will, by the granting of time, be fully met. This you give no promis- of. That you are working to the end that loss may be averted is too indefinate. What assurance have we that your confidence of success may be in any measure realized? That may be well enough in its way; it is not what we want. The cotton shows a big loss; we desire cash to protect it, and we particulary desire that you should do just what we have your promise you would do, and, above all, that you make it perfectly secure against any peradventure of a loss. We regret that after going to the outside of indulgence before we called you that you should then have failed to do what at the beginning of your own motion you so positively stated as a part of your contract with us in the matter of margin, and in taking orders that you did not take them from those upon whom you could rely to respond, and so make the safety that you reported to be the feature of the business absolutely certain. We now again ask you to send us the margin we asked you for to the market. The only way you can satisfactorly work
99 *that* to the end — there may be no loss is to send it. We shall be pleased for you to do us the favor of giving this your prompt attention.

Yours truly, RICH'D H. ALLEN & CO.

Address all communications to our street and number.

15.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 19, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: Having no response to our telegram of yesterday to

you, in which we said your telegram was not satisfactory, and no margin having yet come in from you, we again, a little after noon, wired you to send margin. At about one o'clock, after our message had gone to you, we got the night message of the 18th inst. from you. As it did not get to us till that hour, you will understand the delay in not hearing from us. The cotton we have open on your several orders shows a large loss. We have requested you to send us margin to the market to protect this cotton. You have not paid the least attention to the request. We therefore wired you at once, in reply to the night message of the 18th, that we could not execute the orders you give therein. Having no margin from you on what has already been done and no assurance that we may expect it soon, we cannot agree to do any more for you till you have provided
100 for the loss already sustained. We do not care to add to the weight of the load now being carried, and as you did not respond to our calls in this case we have no assurance that you would do so if we did any more for you. We cannot proceed further with you till you have fixed up the matter already pending. We shall be glad for you to do this at once.

Yours truly, RICHARD H. ALLEN & CO.

16.

Richard H. Allen & Co., bankers, 31 & 33 Broad St.

NEW YORK, *Nov.* 20, 1886.

Messrs. B. S. Bibb & Co., Selma, Ala.

DEAR SIRS: Your telegram of this date is at hand, and we at once wired you in reply, which we beg now to confirm. You laid before us a proposition in respect to executing orders for contracts. We agreed to it with one addition, which you confirmed. This embodies all the agreement between us. Proceeding under it, we have performed all we agreed to perform. You failed to perform one of the most essential parts of the agreement, and that, too, one of the parts of your own original proposition. After your failure to send us the margin you promised specifically by wire to send you sent in another large order to be executed, and we wrote you, before going further, that we wanted the other matter arranged. This you must have before this date. We did not agree to do everything you might direct. Our action was free if the conditions agreed
101 upon were not complied with. You most certainly failed to comply with one of the most essential and important conditions. We are willing to proceed under that agreement as soon as you comply with your part of it. We are not bound to do this, even. We admit no other responsibility than that set out in the agreement. Your own failure to carry it out is an abrogation of its continuance. If we wish to conclude it your failure left us free to do so. We do not know what your message means by saying you anticipated advance, and as we refused to co-operate you will hold us responsible. We are prepared to meet any liability we may have, but shall be glad to know what claim you may have. We deny any such; you had no claim on us for lack of co-operation, for we made

no agreement to co-operate, and it is within our discretion to decline any orders *any orders* that may come to us. It is possible you may be misled into taking such a position. It may be that your anticipation of the advance was what caused you to take it. If we admitted our liability for not executing your last order, which we do not by any means, for we claim the right to decline to execute any order we may see fit, there is no liability in this case, as your telegram did not reach us till nearly one o'clock on yesterday; the market was then just at the prices it is at now; the anticipated advance had already taken place, and we wired you we could not go further till you had arranged the other matter then pending.
102 If our reply was not satisfactory you could have filled the orders at the same or less prices yesterday in other channels and to-day you could do the same; but this is neither here nor there. We have no protection to the contracts now open, and we are absolved from going further and cannot do it till you furnish the margin asked for.

Yours truly, RICHARD H. ALLEN & CO.

Exhibit No. 4—end.

EXHIBIT NO. 5 TO BILL OF EXCEPTIONS.

(Beginning.)

Bonds and stocks bought and sold. B. S. Bibb & Co., general brokers, insurance and real-estate agents, 1022 Washington St.

References: Banks and merchants of Selma.

SELMA, ALA., *Octo. 29th*, 1886.

Mess. Richard H. Allen & Co., New York.

GENTS: We have your favor 26th & note contents. We were pleased to meet your Mr. Haslip, and in the course of conversation told him we might be induced to send you some orders if proper inducements were offered, thoug- our present connections in your city — very satisfactory in every respect. We do a large and safe business in futures, the speculative element being large here amongst our best and most reliable people. We hold ourselves personally responsible for all orders sent; hold our correspondence responsible for all orders executed as to margins. We never put up any
103 unless the market goes against our account as a whole to some considerable amount, then our friends call on us if they get hard up and we respond. We appreciate their confidence, and are very careful not to involve either them or ourselves by dealing only with perfectly responsible parties. We cannot afford to pay $10.00 commissions, as the commissions have been cut down at this end of the line very much, and we believe in a fair divisions and think $7.50 enough, as our orders are large and as a rule closed quickly. We always pay our telegrams and our correspondents do the same. We handle sometimes from 3 to 5,000 bales a day, and our customers deal in from 500 to 1,000 bales at a time, and are

satisfied with small profits, which of itself is a good feature for both ends. You can digest our ideas and if agre-able let us hear from you again.

Truly, &c., B. S. BIBB & CO.

Bonds and stocks bought and sold. B. S. Bibb & Co., general brokers, insurance and real-estate agents, 1022 Washington street.

Reference: Banks and merchants of Selma.

SELMA, ALA., *Nov. 6th*, 1886.

Mess. Richard H. Allen & Co., New York.

GENTS: We are to-day in receipt your favor 3d inst., and carefully note same. All right; you shall hear from us soon. We use Shepperson's Code, edition of 1881. We want it understood,
104 however, that if we give you a portion of our business you will not accept orders in Selma from other parties direct, for if you did there would be no incentive for us to work amongst our friends to build up a business for you. It is understood that we guarantee every order sent you and *and* you guarantee every profit on any order, each party to pay his own telegrams. We expect you, of course, to keep us well posted and to wire any sudden change in the market or any strong opinion you may form through any special points you may pick up. Telegrap-ic opinions, you know, make] business, whether they prove correct or not, and there is always a reason to be given if the opinion should prove incorrect. Trusting the business may prove mutually profitable & awaiting your further favors, we remain—

Truly, &c., B. S. BIBB & CO.

Bonds and stocks bough- and sold. B. S. Bibb & Co., general broker-, insurance and real-estate agents, 1022 Washington St.

Reference: Banks and merchants of Selma.

SELMA, ALA., *Nov. 10th*, 1886.

Messrs. Richard H. Allen & Co., New York.

GENTS: We wired you N. M. last evening if bureau report was considered favorable to sell 2,500 Jan'y & 1,000 Feb'y for ac-
105 counts as stated, to-day at 1.30—our time 2.30—New York time. We received your message saying bureau report not so favorable, and asking instructions. We at once replied, "Execute the orders promptly," and later received your telegram reporting sale of 2,500 Jan'y, 8.99, and 1,000 Feb'y, 9.09, and same is satisfactory. We wire you to-night, "If market opens as high or higher, sell 1,500 Jan'y account Winston," and trust you can get in. Always wire us by the Mutual Union. They connect at Richmond with Southern Telegraphic Co., whose office here is nex- door to us, & there is no delay in delivery, and it is quicker services anyway. Don't forget this. Keep us well posted. Cotton looks low; but unless speculation takes hold and receipts fall off we and many of our friends looks for still lower prices, though as a rule we advise

closing out our small profits. Be liberal and prompt and we will give you a good business & a safe business.

Truly, &c., B. S. BIBB & CO.

Bonds and stocks bought and sold. B. S. Bibb & Co., general brokers, insurance, and real-estate agents, 1022 Washington street. Reference: Banks and merchants of Selma.

SELMA, ALA., *Nov.* 20, 1886.

Messrs. Richard H. Allen & Co., New York.

GENTS: Relative to margins, your call came at a bad time, 106 as money is very tight here, especially with our best customers—the cotton men. We consider the deals all right, and will submit the margin asked for as soon as practicable. We wired you N. M. on the 18th to buy 10,000 bal-s Jan'y, 6,000 bales Feb'y, and 6,000 bales March, and you wire declining to do so. Personally, we have faith in an advance, and desire to take advantage of our belief, and at same time make back some of the loss on existing deals. We wired you this morning that we should hold you responsible for the order, and we now confirm same by letter.

You solicited our business, and have no reason to believe that you will ever loose one dollar by us; and your refusal to fill our orders has not only placed us in a bad predicament, but might cause us to loose both business and money, and we propose to demand the execution of our order to buy at an average of the market on 19th inst.

Truly yours, B. S. BIBB & CO.

(Exhibit No. 5—end.)

EXHIBIT No. 6.

(Beginning.)

Southern Telegraph Company.

Number, 3 A.	Sent by H.	Rec'd by Co.	Time, 9.50.	9 paid.	Check.

Dated New York, 11.

Rec'd at Selma, Ala., —— —, 188–.

To. B. S. Bibb & Co.:

Sold 1000 Jan'y, 9.03; 500 Jan'y 9.02.

Have sold January 1000 bales cotton 9.03 and have sold January delivery 500 bales cotton 9.02 for Winston prices during the next * * * days will be ruled by Liverpool.

RICHARD H. ALLEN & CO.

107 Southern Telegraph Company.

Number, 3 A.	Sent by H.	Rec'd by Co.	Time, 10.20 a. m.	19 paid.

Dated New York, —— 12.
Rec'd at Selma, Ala., —— —, 188–.

To B. S. Bibb & Co.:

"Have sold January delivery 700 bales cotton 9.06 and have sold January delivery 300 bales cotton 9.07 Edith have sold January delivery 700 bales cotton 9.06 and have sold January delivery 300 bales cotton 9.07 Edgard Have sold January delivery 400 bales cotton 9.06 and have sold January delivery 100 bales cotton 9.07 Edmond Market firm with good demand.

RICH'D H. ALLEN & CO.

Southern Telegraph Company.

Number, 7 A.	Sent by H.	Rec'd by Fo.	Time, 14 paid.	Check, 12.50 p. —.

Dated New York, —— 11.
Rec'd at Selma, Ala., —— —, 188–.

To B. S. Bibb & Co.:

Private advices from Liverpool inform us market raided by selling from this side. Cotton healthy and trade demand good.

RICHARD H. ALLEN & CO.

Southern Telegraph Company.

Number, 13 A.	Sent by A D.	Rec'd by Jo.	Time, 3.50 p.	Check, o paid.

Dated New York —— 12.
Rec'd at —— Nov. 12, 188–.

To B. S. Bibb & Co.:

"Please remit margin of $3,800, answer" we do not think it safe to sell short at present prices Market strong throughout the list and we do not think it a good time to operate on the bear side.

RICHARD H. ALLEN & CO.

Southern Telegraph Company.

Number,	Sent by	Rec'd by	Time,	Check,
12 A.	W N.	Fo.	12 paid.	3.30 p. —.

Dated New York, —— 12.
Rec'd at ——, —— —, 188–.

To B. S. Bibb & Co.:

"Have sold January delivery 2,500 bales cotton as per order present movement not speculative, but due to legitimate causes the close of the market seems to have discounted any possible decline to-morrow please remit margin $4,200.

RICHARD H. ALLEN & CO.

108 Southern Telegraph Company.

Number,	Sent by	Rec'd by	Time,	Check,
4 A.	H.	Fo.	——.	14 paid.

Dated New York, —— 13.
Rec'd at ——, —— —, 188–.

To B. S. Bibb & Co.:

Liverpool just met our advance market waiting for Effeer from our side no special feature.

RICH'D H. ALLEN & CO.

Western Union Telegraph Company.

Number,	Sent by	Rec'd by	7 p. c. via Augusta, Ga.
6 p. m.	N.	W.	

Rec'd at Selma, Ala., Nov. —, 1886.
Dated New York, —— 15.

To B. S. Bibb & Co.:

"Margins to the present market price on transactions for your account amount to about $8,000. How much have you remitted? Please remit at once additional margin of $— to equal the advance market strong and advancing answer.

RICH'D H. ALLEN & CO.

Southern Telegraph Company.

Number,	Sent by	Received by	Time,	Check,
3 A.	O.	Fo.	10 paid.	9.55 a. m.

Dated New York, —— 16.
Rec'd at ——, 11—16, 1886.

To B. S. Bibb & Co.:

Mills' circular estimating crop six seven caused Liverpool to decline.

RICH'D H. ALLEN & CO.

109 Southern Telegraph Company.

Number,	Sent by	Rec'd by	Time,	Check.
2 A.	H.	Fo.	11 paid.	9.26 a. m.

Dated New York, —— 16.
Rec'd at ——, ——, 188–.

To B. S. Bibb & Co.:

We have not received remittance for margins to market price. Refer you to our telegram of 13th instant and your reply. How much have you remitted & when? Have received no reply to our telegram of 15th instant. Please give it your attention.

RICHARD H. ALLEN & CO.

109*a* Southern Telegraph Company.

Number,	Sent by	Rec'd by	10 paid.	Time,
11 A.	W N.	Fo.		1.45 p. —.

Dated New York, —— 16.
Rec'd at Selma, Ala, 11, 16, 1886.

To B. S. Bibb & Co.:

"We have not received remittance yet, having received no response to our call for margin. We again ask how much margin have you remitted and when can we expect a remittance? Answer.

RICHARD H. ALLEN & CO.

The Western Union Telegraph Company.

Number,	Sent by	Rec'd by	16 paid. Via Montg'y, Ala.
M Y 11.	X.	Fo.	

Rec'd at 9.37 a. —, Selma, Ala., Nov. 17, 1886.
Dated New York, —— 17.

To B. S. Bibb & Co.:

"Having received no response to our call for margin, unless you send by wire through your bank to-day. Margins to market price we shall have to cover.

RICHARD H. ALLEN & CO.

Southern Telegraph Company.

Number,	Sent by	Rec'd by	Time,	Check. 37 paid.
1 A.	M.	E N.	4.50 p. —.	

Dated New York, —— 17.
Rec'd at ——, 11, 17, 1886.

To B. S. Bibb & Co.:

"Now 4 p. m. and we have not received remittance and have received no reply to our telegram of * * * Please give it attention: Is this cotton in fact for good customers? If so why don't you remit? Unless you send enough margin to equal change in our market, give us their names. If you cannot wire it, will you remit? If you have not, answer immediately; do not wait for night message and we will cover at our discretion."

RICHARD H. ALLEN & CO.

Southern Telegraph Company.

Number,	Sent by	Rec'd by	Time,	11 paid.
3 A.	B.	En.	3.10 p. m.	

Dated New York, —— 18.
Rec'd at ——, Nov. 18, 1886.

To B. S. Bibb & Co.:

"Your telegram is not satisfactory. Market against you 5,000 we require margins to market price. Please remit margin of $ * * by telegraph.

RICHARD H. ALLEN & CO.

110 The Western Union Telegraph Company.

Number, 21 No.	Sent by O X.	W.	11 paid.	

Rec'd at 9.20 p. —, Selma, Nov. 19, 1886.
Dated New York, —— 19.

To. B. S. Bibb & Co.:

"We require margin to market price, will margin be furnished? As we fear market will advance we do not care to run the risk."

RICHARD H. ALLEN & CO.

Southern Telegraph Company.

Number, 6 A.	Sent by A 1.	Rec'd by Co.	18 paid.	10.6 p. m. Check.

We decline to go further till the other matter is made satisfactory. Instruct us on open contracts only.

RICHARD H. ALLEN & CO.

Southern Telegraph Company.

Number, 4 A M.	Sent — A.	— by Co.	Time, 1.20 p. —.	Check. 42 paid.

Dated New York, —— 20.
—— ——, 11, 20, 188–.

To B. S. Bibb & Co.:

We have performed our agreement with you & expected you to perform yours which you have failed in on the basis of that agreement we are willing to proceed when present contracts are protected to the market we admit no other responsibility.

RICHARD H. ALLEN & CO.

111 Southern Telegrap- Company.

Number, 3 A.	Sent by B.	Rec'd by M.	Time, 3.20 p. *l.*	A. paid.

Dated New York, —— 10.
Rec'd at Selma, Ala., Nov. 10, 1886.

To B. S. Bibb & Co.:

"Have sold January delivery 2500 bales cotton 8.99 and *and* have sold February delivery 1000 bales cotton 9.09 for account as ordered"

RICHARD H. ALLEN & CO.

Southern Telegraph Company.

Number,	Rec'd by	Time,	9.
8 A.	T.		17 paid.

Dated New York, —— 30.
Rec'd at ——, Dec. 30, 1886.

To B. S. Bibb & Co.:

"We have bought for your account to cover your sales January 3000. 9.46 2000 9.47, 1000 9.48 1500 9.49, 1000 950, 500 9.51 Feby 9, 59.

RICHARD H. ALLEN & CO.

(Exhibit No. 6—end.)

EXHIBIT No. 7 TO BILL OF EXCEPTIONS.

Begin-ing.

Dated Selma, Alabama, —— 9, 1886.
Rec'd at ——, 11.12, Nov. 9.

To Richard H. Allen & Co., N. Y.:

If bureau report is considered favorable tomorrow sell for January delivery 1000 bales cotton account Albert. Sell for February delivery 1000 bales cotton account Alfred Sell for January delivery 1000 bales cotton account Alexander Sell for January delivery 500 bales cotton account Andrew, act promptly if favorable.

B. S. BIBB & CO.

112 Dated Selma, Ala., —— 10.
134 Pearl St., Nov. 10, 1886.

To Richard H. Allen & Co., N. Y.:

Execute the orders promptly.

B. S. BIBB & CO.

Dated Selma, Ala., —— 10, 1886.
Received at 10.11 p. —, Nov. 10.

Richard H. Allen & Co., N. Y.:

If market opens as high or higher tomorrow sell for January delivery 1500 bales cotton account Winston Keep us thoroughly posted.

B. S. BIBB & CO.

Dated Selma, Ala., —— 11, 1886.
Received 11.49, Nov. 11.

To Richard H. Allen & Co., N. Y.:

At 9.06 sell for January delivery 1000 bales cotton Edith Sell for January delivery 1000 bales cotton Edgar Sell for January delivery 500 bales cotton Edmond Wire promptly any new feature

B. S. BIBB & CO.

" Dated Selma, Ala., —— 12.
Rec'd at 134 Pearl St., N. Y., Nov. 12, 188–.

To Richard H. Allen & Co.:

At 903 sell for January delivery 1000 bales cotton Amanda Sell for January delivery 1000 bales cotton Ambrose. Sell for January delivery 500 bales cotton Amos.

B. S. BIBB & CO."

113 Dated Selma, Ala., —— 12.
Rec'd at 134 Pearl St., N. Y., Nov. 12, 1886.

To Richard H. Allen & Co., N. Y.:

Customers all right no need for uneasiness we assure you.

B. S. BIBB & CO.

Dated Selma, Ala., —— 12.
Rec'd 134 Pearl St., N. Y., Nov. 12, 1886.

To Rich'd H. Allen & Co.:

" Will send the margin you ask for no cause for uneasiness."

B. S. BIBB & CO.

Western Union Telegraph office.
Richard H. Allen & Co., Nov. 12, 1886.

R. H. Allen & Co.:

Please call and receipt for a dispatch (No. 474) was no one at its place of address to receive it at six o'clock and 10 minutes.
Delivered from 673—134 Pearl 100 Water St.

Dated Selma, Ala.
Rec'd at 134 Pearl St., N. Y., Nov. 16, 188–.

To Richard H. Allen & Co.:

At 9.28 sell for January delivery 1000 bales cotton each, Samuel Silas, & Stephen, William.

B. S. BIBB & CO.

Dated Selma, Ala., 11, 18.

Richard H. Allen & Co.:

Have faith and patience and neither of us will sustain any loss we are working to that end & confident success, at Baronet for January close all deals.

114 Dated Selma, Ala., —— 18.
Rec'd at 57 Broadway, New York, Nov. 19, 1886.

Richard H. Allen & Co., N. Y.:

Buy for January delivery 10000 bales cotton.
Buy for February delivery 6000 bales cotton.
Buy for March delivery 6000 bales cotton.

B. S. BIBB & CO.

Dated Selma, Ala., —— 20.
Rec'd 134 Pearl St., Nov. 20, 1886.

Richard H. Allen & Co., N. Y.:

We anticipated advances hence orders to buy You refuse to co-operate and we shall hold you responsible.

B. S. BIBB & CO.

Exhibit No. 7—end.

114½ *Charter, By-Laws, and Rules New York Cotton Exchange.*

EXHIBIT No. 3.

Charter, by-laws, and rules New York Cotton Exchange, 1886.

115 Charter, by-laws, and rules of the New York Cotton Exchange, 1886, eleventh edition.

115½ STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On the 20th day of May, 1887, before me, Chas. H. Griffin, a commissioner of deeds for the city of New York and State aforesaid, personally appeared George E. Moore, Esqr., secretary of the board of managers, and Edward R. Powers, Esqr., superintendent of the New York Cotton Exchange, to me known and known to me to be the officers aforesaid, and, on their being individually duly sworn, say that the book hereto annexed is a true copy of the act passed by the New York State legislature incorporating the New York Cotton Exchange, with all the amendments thereto, passed by said legislature, and also a copy of the by-laws and rules adopted by said exchange in conformity to the act of incorporation, and that they were duly passed and adopted in due form by said exchange, all of which was in full force and effect during the months of November and December, 1886, and are still in force.

GEO. E. MOORE, *Sec.*
EDWARD R. POWERS, *Sup't.*

Sworn to before me this 20th day of May, 1887.

CHAS. H. GRIFFIN,
Commissioner of Deeds for the City of N. Y.

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Chapter 365.

An act to incorporate the New York Cotton Exchange, passed April 8, 1871.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The members of the association known as the "New York Cotton Exchange" and all other persons who may hereafter become associated with them under the provisions of this act, are hereby created a body corporate, by the name of the "New York Cotton Exchange," with perpetual succession and power to use a common seal, and alter the same at pleasure, to sue and be sued, to take and hold, by grant, purchase and devise, subject to the provisions of law relating to devises and bequests by last will and testament, real and personal property to an amount not exceeding three hundred thousand dollars, for the purpose of

See amendment, page 8.

such association and to sell, convey, lease and mortgage the same or any part thereof.

SECTION 2. The property, affairs, business and concerns of the corporation hereby created shall be managed by a president, vice-president, treasurer and fifteen managers, who, together, shall constitute a board of managers to be elected annually, at such time and place as may be provided by the by-laws; and the present officers and managers of the said association, as now constituted, shal- be the officers and managers of the said corporation until their present term of office shall expire, and until others, under the provisions of this act shall be elected in their place. All vacancies which may occur in said board by death, resignation or otherwise, shall be filled by the said board. A majority of the members of such board shall constitute a quorum for the transaction of business.

Management.

120

Vacancies.

Quorum.

SEC. 3. The purposes of said corporations shall be to provide, regulate and maintain a suitable building, room or rooms, for a cotton exchange in the city of New York, to adjust controversies between its members, to establish just and equitable principles in the trade, to maintain uniformity in its rules, regulations and usages, to adopt standards of classification, to acquire, preserve and disseminate useful information connected with the cotton interest throughout all markets, to decrease the local risks attendant upon the business, and generally to promote the cotton trade of the city of New York, increase its amount and augment the facilities with which it may be conducted. The said corporation shall have power to make all proper and needful by-laws, not contrary to the constitution and laws of the State of New York or of the United States. (See section 3 as amended, page 9.)

Purposes of the exchange.

SEC. 4. The said corporation shall have power to admit new members and expel any member, in such manner, as may be provided by the by-laws.

Admissions and expulsions.

SEC. 5. The board of managers shall annually elect, by ballot, four members of the association, who shall not be members of the board, as a committee, to be known and styled the adjudication committee of the New York Cotton Exchange. The board of managers may, at any time, fill any vacancy or vacancies that may occur in said committee for the remainder of the term in which the same shall happen. It shall be the duty of said adjudication committee to hear and decide any controversy which may arise between the members of the said association, or any person claiming by, through, or under them and as may be voluntarily submitted to said committee for arbitration and such members and persons may, by an instrument in writing, signed by them and attested by a subscribing witness, agree to submit to the decision of such committee any such controversy

Adjudication committee.

121

How to bring cases before committee.

which might be the subject of an action at law or in equity, except claims or title to real estate or to any interest therein, and that a judgment of the supreme court shall be rendered upon the award made pursuant to such submission.

SEC. 6. Such adjudication committee or a majority of them, shall have power to appoint a time and place of hearing of any such controversy, and adjourn the same, from time to time as may be necessary, not beyond the day fixed in the submission for rendering their award, except by consent of parties, to issue subpœnas for their attendance of witnesses residing or being in the metropolitan police district. Witnesses so subpœnaed, as aforesaid shall be entitled to the fees prescribed by law for witnesses in the courts of justices of the peace.

Witnesses.

SEC. 7. Any number, not less than a majority of all the members of the adjudication committee, shall be competent to *to* gether and hear the proofs and allegations of the parties, and award by a majority of those who shall have been present at the hearing of the proofs and allegations shall be deemed the award of the adjudication committee, and shall be valid and binding on the parties thereto. Such award shall be made in writing, subscribed by the members of the committee concurring therein, and attested by a subscribing witness.

Quorum.

Upon filing the submission and award in the office of the clerk
122 of the supreme court of the city and county of New York, both duly acknowledged or proved in the same manner as deeds are required to be acknowledged or proved in order to be recorded, a judgment may be entered therein according to the award, and shall be docketted, transcripts filed, and execution issued thereon, the same as authorized by law in regard to judgments in the supreme court. Judgments entered in conformity with such award shall not be subject to be removed, reversed, modified, or in any manner appealed from by the parties thereto, except for fraud, collusion, or corruption of said adjudication committee or some member thereof.

SEC. 8. This act shall take effect immediately.

STATE OF NEW YORK, }
Office of the Secretary of State, } *ss:*

I have compared the preceeding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

Given under my hand and seal of office, at the city of Albany, this twelfth day of April, in the year one thousand eight hundred and seventy-one.

DIED. WILLERS, JR.,
Dep. Secretary of State.

Chapter 228.

An act to amend chapter three hundred and sixty-five of the laws of eighteen hundred and seventy-one entitled "An act to incorporate the New York Cotton Exchange." Passed May 8, 1880.

Gratuity fund.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Chapter three hundred and sixty-five of the laws of eighteen hundred and seventy-one, entitled
123 "An act to incorporate the New York Cotton Exchange" is hereby amended by adding thereto the following:

SEC. 9. It shall be lawful for the said New York Cotton Exchange, upon the death of any member, to levy and assess upon every membership in the said exchange, except the membership or memberships of such deceased member, a fixed and uniform sum not exceeding twelve dollars and fifty cents, which shall be collected in the same manner, and under the same penalties for non-payment, as the by-laws of said exchange shall at the time provide in the case of annual dues.

Gratuity assessment.

SEC. 10. The said New York Cotton Exchange shall within one year after its receipt of satisfactory proof of the death of any member, pay the amount so assessed and collected, less the actual expense incurred in the collection thereof, to the widow, children or next of kin of such deceased member, in the following order: If such deceased member shall have left a widow and no children, then the whole of said sum shall be paid to his widow; if he shall have *have* left a widow and child or children then one-half of said sum shall be paid to his widow and one-half to such child or children, share and share alike; if he shall have left a child or children and no widow then the whole of said sum shall be paid to said child or children, share and share alike; if he shall have left neither widow nor children, then the whole of said sum shall be paid to the next of kin of such deceased member in the order and proportion that is provided by law for the distribution of personal property in cases of intestacy. The word children, as used in this section, shall be construed to include the issue of deceased children, and the issue of any deceased child shall receive the share that the parent would be entitled to receive if living. If any person entitled under this action to
124 any share in said sum shall be an infant, such share shall be paid to the general or testamentary guardian of such infant.

See section 10 as amended by the legislature on page 9.

SEC. 11. Nothing herein shall be so const-ued as to vest in any member of said exchange any estate in possession or expectancy which can be disposed of by will or pledged or mortgage for the payment of any debt, and the amount collected and paid over as hereinbefore provided shall be so paid to the person or persons entitled thereto absolutely, and shall not be liable

Gratuity cannot be pledged.

for any debts, charges or demands against such deceased member or his estate.

SEC. 12. Nothing herein contained shall be so construed as to create any liability on the part of the New York Cotton Exchange except that of paying over to the person or persons entitled thereto the amount which shall in such case be actually collected, less the expenses of collection, and the said New York Cotton Exchange shall not be charg-able with or liable for interest upon any amount so collected: and the decision or decree of the surrogate or judge of probate or other officer having jurisdiction of the estates of intestates in the county in which said deceased member shall have been domiciled at the time or immediately prior to his decease shall be sufficient and conclusive evidence of the right of any claimant or claimants, and payment to any person or persons who by such evidence shall appear to be entitled thereto shall forever release and absolve the said New York Cotton Exchange from all further claim or liability whatsoever, and shall be a sufficient bar and defense to any action or proceeding at law or in equity which may thereafter be commenced against said exchange by any person or persons claiming to be entitled to receive the sum so paid or any part thereof.

See sec. 12 as *as* amended by the legislature, page —.

SEC. 13. The provisions hereinbefore contained shall not
125 extend to any person who shall have ceased to be a member of said exchange, either by expulsion or *or* by a voluntary or forced sale of his membership, but shall extend to *mem to* members under suspension, and the membership or memberships owned by the estate of any deceased member shall be subject to the same assessments as if said member were living.

SEC. 2. The New York Cotton Exchange is hereby authorized and empowered to adopt suitable rules and by-laws to carry into effect the foregoing provisions, and from time to time to amend the same as may be necessary; and the adoption of such rules and by-laws shall be deemed to be an acceptance by said New York Cotton Exchange of this amendment to the act incorporating said exchange.

Empowered to adopt rules.

SEC. 3. This act shall take effect immediately.

STATE OF NEW YORK, }
Office of the Secretary of State, } *ss:*

I have compared the preceeding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

Given under my hand and seal of office of the secretary of state, at the city of Albany, this eleventh day of May, in the year one thousand eight hundred and eighty.

JOS. B. CARR,
Secretary of State.

Chapter 113.

An act to amend chapter three hundred and sixty-five of the laws of eighteen hundred and seventy-one, entitled "An act to incorporate the New York Cotton Exchange." Passed April 19, 1881.

126 The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. Section one of chapter three hundred and sixty-five of the laws of eighteen hundred and seventy-one, entitled "An act to incorporate the New York Cotton Exchange," is hereby amended so as to read as follows:

SECTION 1. The members of the association known as the "New York Cotton Exchange" and all other persons who may hereafter become associated with them under the provisions of this act, are hereby created a body corporate by the name of the "New York Cotton Exchange" with perpetual succession and power to use a common seal, and alter the same at pleasure, to sue and be sued, to take and hold, by grant, purchase, and devise, subject to the provisions of law relating to devises and bequests by last will and testament, real and personal property to an amount not exceeding one million dollars, for the purpose of such association, and to sell, convey, lease and mortgage the same or any part thereof.

SEC. 2. This act shall take effect immediately.

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I have compared the preceeding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

Given under my hand and the seal of office of the secretary of state, at the city of Albany, this 22d day of April, in the year one thousand eight hundred and eighty one.

[SEAL.]

(Signed) JOSEPH B. CARR,
Secretary of State.

127 *Amendments to Charter Passed by the Legislature February,* 1883.

SECTION 3. The purposes of said corporation shall be to provide, regulate and maintain a suitable building, room or rooms for a cotton exchange, in the city of New York, to adjust controversies between its members, to establish just and equitable principles in the trade, to maintain uniformity in its rules, regulations in its usuages, to adopt standards of classifications, to acquire, preserve and disseminate useful information connected with the cotton interest throughout all the markets, to decrease the local risks attendant upon the business, and generally promote the cotton trade of the city of New York, increase its amount and augment its facilities with which it may be conducted, and to make provision for the widows and families of deceased members. The said corporation should have power to make all

Purposes of the exchange.

proper and needful by-laws not contrary to the constitution and laws of the State of New York or of the United States.

Gratuity fund.

SEC. 10. The said New York Cotton Exchange shall, within one year after its receipt of satisfactory proof of the death of any member, pay the amount so assessed and collected or such portion thereof as the by-laws of said corporation may provide and such proportion of the surplus income of said New York Cotton Exchange as the by-laws may provide, to the widow, children or next of kin of such deceased member, in the *the* following order: If such deceased member shall have left a widow and no children, then the whole of said sum shall be paid to his widow; if he should have left a widow and a child or children, then one-half of said sum shall be paid to his 128 widow and one-half to such child or children, share and share alike; if he shall have left a child or children and no widow, then the whole of said sum shall be paid to such child or children share and share alike; if he shall have left neither widow nor children, then the whole of said sum shall be paid to the next of kin of such deceased member in the order and proportion that is provided by law for the distribution of personal property in cases of intestacy. The word children, as used in this section, shall be construed to include the issue of deceased children, and the issue of any deceased child shall receive the share that the parent would be entitled to receive if living. If any person entitled under this section to any share in said sum shall be an infant, such share shall be paid to the general or testamentary guardian of such infant.

SEC. 12. Nothing herein contained shall be so construed as to create any liability on the part of the New York Cotton Exchange, except that paying over to the person or persons entitled thereto the amount prescribed by the by-laws of such corporation, if it shall actually be collected and received by said corporation, and the said New York Cotton Exchange shall not be chargeable with or liable for any interest upon any amount so collected; and the decision or decree of the surrogate, or judge of probate, or other officer having jurisdiction of the estates of intestates in the county in which said deceased member shall have been domiciled at the time or immediately prior to his decease, shall be sufficient and conclusive evidence of the right of any claimant or claimants, and payment to any person or persons who by such evidence shall appear to be *in*titled thereto, shall forever release and absolve the said New York Cotton Exchange from all further claim or liability whatsoever, and shall be a sufficient bar and defense to any action or proceeding at law or in equity which may thereafter be commenced against said exchange by any person or persons claiming to be entitled to *to* receive the sum so paid, or any part thereof.

129 CHAPTER FIRST.

Membership.

Title 1.—Acquisition of membership.

Article 1. Who may become members.
" 2. Election of members.
" 3. Initiation fee, dues, and assessments.

Title 2.—Rights and duties of members.

Article 1. Of members failing to meet their liabilities and obligations at maturity.
" 2. As to claims, disputes, differences, and controversies between members.
" 3. Of appeals to the board of appeals.

Title 3.—Suspensions and expulsions.

130 TITLE 1.

Acquisition of Membership.

ARTICLE 1.

Membership.

SECTION 1. All persons twenty-one years of age, resident or nonresident, of good character and financial standing, may be elected members of this association; but no person whose application for admission to membership has been acted upon and rejected by the exchange shall be again eligible for election until after the expiration of six months from date of such rejection.

Who may become members.

ARTICLE 2.

Election of Members.

SEC. 2. An application for membership must be addressed to the chairman of the committee on membership, who shall cause the name of the applicant to be posted upon the bulletin of the exchange for ten (10) days before the consideration of the application by the committee.

Method of election of members.

If then approved by them, it shall be referred to the board of managers. If the board shall, by a two-thirds (2-3ds) vote recommend the candidate, it shall cause to be posted on the bulletin of the exchange a notice containing the name and address of the candidate and appoint a time for voting thereon, by the members of the exchange. Such voting shall always be by ballot, and held in the exchange room on a Monday, and not less than five days after the posting of said notice. The polls shall be opened at 12 o'clock noon and closed at 2 o'clock p. m., and each member of the ex-

change may cast, in person one vote on which shall be written or printed the word, "Yes" if in favor of the election
131 of the candidate, or the word "No" if in opposition thereto. Three-fourths of the whole number of votes cast must be in favor of the election of a candidate to entitle him to membership. No blank votes shall be counted. The superintendent of the exchange, or his assistant shall act as teller, and shall record the names of the members voting. Two members of the board of managers, or of standing committees, shall be present at the counting of the ballots, and shall promptly sign and post upon the bulletin of the exchange, a certificate of the result of the voting.

Number of votes necessary and counting same.

SEC. 3. Every person who shall be elected to membership in the exchange shall subscribe to the charter, by-laws and rules of the exchange; if a resident of the city of New York, within ten (10) days and if a non-resident of the city of New York, within thirty (30) days after receiving notice of his election, and thereby pledge himself to respect and abide by the same, and also all by-laws, rules and regulations that may thereafter be adopted, and shall also (*a*) pay to the treasurer the initiation fee and annual dues for the current year (unless he shall be elected between the first day of March and the Thursday next succeeding the first Monday of June in which case he shall pay one-half of said dues) or shall (*b*) procure a transfer to himself of a certificate of membership as hereinafter provided, or his election shall be void.

Time in which to qualify & dues.

ARTICLE 3.

Initiation Fees, Dues, and Assessments.

SEC. 4. The initiation fee for membership in the exchange shall be ten thousand dollars, for which a certificate of membership shall be issued.

SEC. 5. A certificate of membership may be transferred to a member, or member elect, but to no other person, by a surrender
132 thereof to the treasurer of the exchange, together with a duly executed assignment thereof, and a fee of twenty-five dollars for transferring the certificate, whereupon the treasurer shall issue a new certificate of membership to the member or member-elect mentioned in said assignment. But no certificate of membership shall be so transferred until a notice of the intention to make such transfer, subscribed by the member owning the certificate, shall have been posted upon the bulletin of the exchange for ten days, and until all claims against such member, which may be presented within said ten days by other member of the exchange, shall be settled, or while any annual dues or assessments levied on such membership shall remain unpaid and if the said membership is not transferred at the

Transfer of membership and posting notice of intention to do so.

expiration of the said ten days, such notice of intention to transfer shall become void.

The executors or administrators of a deceased member may transfer their decedent's certificate as herein provided.

In every case in which any attachment, injunction or other legal process, or notice, emanating from a court or judge or any officer of a court, shall be served upon any officer of the exchange, affecting the seat or right of membership of any member of the exchange, the officer upon whom it is served shall at once notify the superintendent, who shall immediately post on the bulletin of the exchange a notice in writing describing the process or notice so served and the name of the member whose seat or right of membership it purports to effect, and shall keep the same posted until said process or notice shall be removed or settled.

SEC. 6. On every membership in the exchange there shall be paid such annual dues as may be fixed by the exchange at the annual meeting in each year, and such assessments as may be from time to time levied by the board of managers.

Dues and assessments.

SEC. 7. All annual dues shall be payable in advance on the Thursday next succeeding the first Monday of June in each year, and all other assessments shall be due and payable at such times as the board of managers may appoint.

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SEC. 8. Any member of the exchange who shall fail to pay any annual dues or assessments, upon any membership or memberships, owned by him, within ten days after the same shall have become due and payable, shall be notified of such failure by the treasurer and shall be deprived of the privileges of the exchange until the same shall be paid and the sum of one dollar ($1) per day shall be added to the amount of such dues and assessments on each membership for each and every day, not exceeding thirty (30) that the same shall remain unpaid after the sending of such notice by the treasurer. At the expiration of said thirty days, if the member notified shall still fail to pay such dues or assessment, the board of managers may declare his membership at an end, and order a sale of all his rights of membership, and after deducting the amount in arrear, together with all penalties and charges accrued thereon from the purchase-money realized in such sale, shall place the balance thereof to the credit of said member, payable without interest to him or to his creditors or legal representatives.

SEC. 9. Whenever any committee of the exchange, having the requisite authority, shall impose any fine, or assess any fees upon a member of the exchange, it shall be the duty of such member to pay the same to the superintendant as soon as notice of such fine or assessment has been given to him, and if he shall fail to do so within three days from the receipt of such notice his name shall be posted by the superintendant upon the bulletin of the exchange, and shall there remain until such fine or assessment is paid, and if at the expiration of three days from the date of such posting, it shall not have been paid the said member shall be deprived of the privileges of the exchange, until he shall have paid said fine or assess-

ment, and may in the discretion of the board of managers be suspended for one month.

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TITLE 2.

Rights and Duties of Members.

ARTICLE 1.

Of Members Failing to Meet Their Liabilities and Obligations at Maturity.

SEC. 10. — member of the exchange who shall find himself unable to meet his liabilities to, or obligations with other members at maturity, shall immediately communicate to the exchange the fact of his inability, by means of a letter addressed to the superintendant, by whom it shall be at once posted on the bulletin of the exchange, where it shall remain for five (5) days.

The posting of such letter shall be considered as due and sufficient notice to all the members of the exchange of the fact therein recited, and shall operate as an immediate closing of all outstanding contracts, agreements, obligations, or liabilities of the member writing it, with or to all other members of the exchange; and no transfer or settlement of any contract for the future receipt or delivery of cotton or print cloths to which said member is a party, shall be made or accepted by any other member of the exchange after said notice, except as herein provided; but all such contracts shall be liquidated and settled at the averag- quotation of like contracts on the day such letter shall be posted, unless the letter be posted within one hour before the closing of the exchange in which case the liquidation and settlement shall be made on the average quotation for the next day.

Any member of the exchange holding a claim or contract against a member who has given notice of his failure, may demand an investigation of the affairs of said alleged failed member by the supervisory committee, and if said committee shall be of the opinion and shall report to the board of managers that said member is able to meet and pay all his contracts and liabilities at maturity, he shall be debarred from the privilege of settlement under the provisions of this article.

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May demand an investigation.

It shall be the duty of the superintendant of the exchange, as soon as he shall learn of the death of any member, to post a notice of such death upon the bulletin of the exchange, which notice shall be due and sufficient notice to all the members of the exchange of the facts therein recited.

All contracts for the future delivery of cotton or print cloths, in which the member whose death is so announced shall have been the sole seller or buyer, or the only member of the exchange in his firm, shall be closed and terminated by the posting of such notice, and shall be liquidated and settled at the average quotations of like

contracts on the day of the posting, unless such notice be posted within one hour before the closing of the exchange in which case the liquidation and settlement shall be made at the average quotations for the next day.

It shall be the duty of every member of the exchange, who shall hold a contract for the future delivery, or receipt of cotton or print cloths in which a member, of whose death a notice is posted as hereinbefore provided, shall have been sole seller or buyer, or the only member of the exchange in his firm to present to the superintendant of the exchange within ten (10) days after the posting of said notice a statement of all such contracts, and any member holding any such contracts and who shall fail to present such statement, may, in the discretion of the board of managers, be suspended from all the rights and privileges of membership for any term not exceeding one year and shall be debarred from participation in the proceeds of the sale of the membership of such deceased member, if such a sale shall be made.

136 SEC. 11. If any member of the exchange shall hold a claim or contract, either as principal or broker, against any other member who has not already been posted as failed, for or arising from the purpurchase or sale of cotton or print cloths, spot, to arrive F. O. B. in transit or for future delivery, which is not settled or liquidated at maturity, he shall record the fact of the failure of said other member to meet his liabilities in a book kept by the superintendant of the exchange entitled "Record of Failures" and if he shall omit or neglect so to do, within ten days after such failure occurs, he shall forfeit all rights under such claim or contract, to force a sale of the rights of membership of said failed membership of said failed member*ship of said failed member* and to participation in the proceeds of such sale and may in the discretion of the board of managers be suspended from the rights and privileges of membership in the exchange for a period not exceeding one year. No claim or contract shall be considered settled or liquidated for the purposes of this section except by cash payment or property actually delivered.

Claims against members not posted.

As soon as the record provided for in this section is made in the "Record of Failures" the superintendant shall deliver a copy thereof to the supervisory committee, who shall promptly examine the proofs of the charge, and if, in their opinion, the failure to meet obligations is proven, they shall instruct the superintendant to promptly post upon the bulletin of the exchange a notice of such failure, and keep it so posted for five (5) days.

SEC. 12. Any member of the exchange who holds a claim either as principal or broker, against any member of whose failure a notice has been posted, either by his own direction or by order of the supervisory committee, which claim has risen on account of the purchase or sale of cotton or print cloths spot, to arrive F. O. B. in transit, or for future delivery and not on account of any note, notes

Time to file claims.

or time obligations, shall record such claim in the "Record
137 of Failures" within thirty (30) days after the posting of said notice, and if he fails so to do, he shall forfeit all right under said claim to participation in the proceeds of the sale of the right of membership of said failed member.

SEC. 13. The superintendent of the exchange shall, within three (3) days after the expiration of thirty (30) days mentioned in the last preceeding section, serve upon the member of whose failure a notice has been posted, a copy of all the claims against him which have been recorded in the "Record of Failures" in accordance with the requirements of the last preceeding section.

If the said member or any of his creditors shall dispute the correctness of any claim so recorded, the member so objecting shall, within three (3) days after the expiration of the aforesaid three days, file with the superintendent a written notice specifying the grounds of his objection thereto, and the superintendent shall, within thre- (3) days after he receives such notice, deliver the same, together with a copy of the claim which it disputes to the arbitration committee.

SEC. 14. Upon receiving such claim, and the objection thereto, the arbitration committee shall proceed to consider the same, and shall hear such testimony as may be offered by either the claimant or the objector, which shall in the judgment of the committee be material and pertinent, and shall within thirty (30) days after such claim and objection is submitted to them, make, sign, and file with the superintendent of the exchange an award thereon in writing. The superintendent shall immediately record such award in the "Book of Decisions of Arbitration Committees" and shall at the same time send by special messenger, a notice of the recording of said award to each party interested therein, which notice shall specify the date and time of such recording, and in default of an appeal therefrom the said award shall be final and binding upon all the parties interested therein.

138 SEC. 15. Three members of the arbitration committee shall constitute a quorum thereof for the consideration of claims and objections, and the concurrence of a majority of those serving shall be necessary and sufficient for rendering an award. Each member so serving shall receive a fee of five dollars ($5) for each award, which shall be paid by the party against whom the award is made, unless the committee as a part of its award shall otherwise direct.

SEC. 16. Within three days after the award of the arbitration committee shall be filed, or, if there be an appeal from such award, within three (3) days after decision thereon by the board of appeals shall be filed, or, if there shall have been no objection made to any claim, within three (3) days after the time allowed for filing such objections, the superintendent shall serve upon the member of whose failure a notice has been posted a list of such claims as have been recorded, and to which no objection has been made, and a notice of the decision of the arbitration committee or of the board of appeals (as the case may be) upon such claims as have been objected to, and if said member shall not within five (5) days pay such awards and claims, the board of managers shall declare his membership at an

end, and order his seat of right of membership to be sold, and the proceeds arising from such sale shall be divided *pro rata* among those creditors who have filed claims to which no objection has been made, and to those to whom awards have been made, and the residue, if any there be, shall after deducting the transfer fee, be paid over by the treasurer to the said member or his legal representatives.

SEC. 17. When the failure of any member of the exchange has been posted either by his own act or by direction of the supervisory committee, the said member shall forfeit all the rights and privileges of membership except the right to arbitration on claims resulting from business transactions with members, entered into before a notice of his failure has been posted, and shall, within ten (10) days thereafter, send to the supervisory committee a statement of his affairs. It shall then be the duty of said committee to examine such statement, and they may in their discretion procure the assistance of an expert accountant, and charge the expense attending his services to the estate of said member.

Failed member must send statement.

If any member who has been so posted shall omit to send to the supervisory committee within said ten (10) days the statement required by this section, or if said committee on an examination shall be of the opinion that the said member has conducted his business in a reckless and unbusiness-like manner, they shall so report to the board of managers, who may, by a two-thirds vote, declare such failed member disqualified for reinstatement.

SEC. 18. Any member of the exchange who, finding himself unable to meet his liabilities and obligations at maturity, shall cause notice thereof to be given to the members of the exchange, as provided in this article, (sec. 10 *ante*) and shall have made honorable settlement with his creditors or shall have offered to pay them *pro rata* to the full extent of his ability, including the market value of his seat or right of membership, may, within one year from the date of his failure, apply for reinstatement through the supervisory committee, who shall within one week from the receipt thereof report to the board of managers such application, together with the opinion of said committee thereon, and the board of managers may, at any meeting subsequent to that at which said report is received, by a vote of two-thirds ($\frac{2}{3}$ds) of the members of the board, reinstate such member in all his rights and privileges of membership upon his paying the initiation fee, or obtaining a transfer to himself of a certificate of membership, as provided in article 3, title 1, of this chap. (sec. 5 *ante*), but this section shall not be construed to authorize the reinstatement of any member of whose failure a notice shall have been posted by order of the supervisory committee.

Reinstate members.

ARTICLE II.

As to Claims, Disputes, Differences, and Controversies Between Members.

SEC. 19. All claims, disputes, differences, and controversies between members of the exchange, arising out of any transactions in cotton or print cloths (unless such transactions shall have been negotiated through a broker or brokers not members of the exchange) shall be subjects of and determined by arbitration as hereinafter provided, if no notice in writing of such claim, dispute, difference, or controversy, and of the intention to demand an arbitration thereon, be served by either party upon the opposite party or parties thereto within thirty (30) days from the discovery thereof, but not otherwise.

SEC. 20. Either party to such claim, dispute, difference or controversy, or if there be apparently more than two members of the exchange interested therein, any two of the parties thereto, shall have the right to demand an arbitration thereon, if notice thereof be given as required in the last preceeding section, and upon notifying the superintendent of such demand he shall at once serve upon every member whom the member or members so making a demand for arbitration shall require to be included therein a written notice that such demand has been made.

SEC. 21. Each member of the exchange included in such arbitration shall within three (3) days after the service of said notice upon him, nominate to the superintendent one member of the exchange to act as arbitrator. If any member or members
141 shall fail or omit so to nominate, the president, or officer presiding for the day, shall, in behalf of said member or members, nominate one member to act as arbitrator. If there be more than two parties to said dispute, difference, or controversy, and more than two arbitrators nominated, the superintendent shall draw by lot, from the whole number so nominated, the names of two of the members to act as arbitrators, and he shall at once notify the members chosen of their appointment. The two arbitrators so appointed shall, within twenty-four hours after notification of their appointment, choose a third from the arbitration committee. And if they cannot agree upon any member of said committee, the shall make such selection by lot. If any member so chosen shall fail to notify the superintendent of his acceptance of the position within twenty-four hours after receiving notice of appointment or selection a substitute shall immediately be appointed or selected as hereinbefore provided.

SEC. 22. The three arbitrators so chosen, or a majority of them shall appoint a time which shall not be more than forty-eight hours from the time of the selection of the third arbitrator, and a place to hear the proofs and allegations of the parties, which shall be reduced to the form of affidavits if required by any party.

Arbitrators' power.

The superintendent shall notify each party to the arbitration of the time and place so appointed.

The arbitrators or a majority of them shall have power to adjourn

the hearing of the proofs and allegations of the parties from time to time, and if, in their judgment, the decision of the dispute, difference, or controversy, will necessarily affect any right or interest of any member of the exchange who has been made a party to the arbitration, they may at any time before rendering their decision require such member to be brought in, and shall hear his proofs and allegations in like manner as if he had originally been a party thereto.

142 SEC. 23. Within three days after the conclusion of the hearing before them, the arbitrators or a majority of them, shall make, sign, and file with the superintendent of the exchange, an award in writing which shall determine the liability or liabilities of each party to the arbitration, and the proportion of the expense thereof to be borne by each party. The superintendent shall immediately record such award in the "Book of Decisions of Arbitration Committes," and shall at the same time send, by special messenger, notice of the recording of such award to the office of each party to the arbitration, which notice shall specify the date and time of such recording, and in default of an appeal therefrom said award shall be final, binding, and conclusive upon each, and every party to such arbitration, and upon all persons claiming through them or either of them.

SEC. 24. Every member of the exchange serving as arbitrator shall receive five dollars ($5) for his services, which shall be a part of the expense of arbitration; but if any arbitrators shall omit or neglect to make, sign and file an award within the time hereinbefore specified, they shall forfeit all claim to remuneration, and the president of the exchange, or officer presiding, for the day, may order them to be discharged from further consideration of the case and other arbitrators shall thereupon be nominated, appointed or selected as hereinbefore provided, who shall proceed to a consideration of the dispute, difference, or controversy *ab initio*, in like manner as if originally appointed thereto. Any party who has demanded an arbitration may withdraw the same at any time before an award has been made, by obtaining the consent of the other party or parties thereto and paying the fees of the arbitrators.

SEC. 25. Within three days after an award shall be made and filed by the arbitrators, or a majority of them, as provided
143 in section 23, or, if their be an appeal from such award, within three (3) days after the decision of the board of appeals thereon be filed, the party or parties against whom such award or decision is made shall pay said award, and in all respects fulfil the same, and upon failure so to do the board of managers shall declare the membership of the party so failing to obey the award at an end, and shall order a sale of his rights of membership and distribute the proceeds thereof as provided in art. 1, title 2, of this chapter (sec. 16 *ante*).

Appeals must be made or award paid.

ARTICLE 3.

Of Appeals to the Board of Appeals.

SEC. 26. Any member of the exchange interested in or affected by an award of the arbitration committee, made and filed under the provisions of article 1, of this title, or by an award of arbitrators made and filed under the provisions of article 2, of this title, may appeal from such award to the board of appeals by filing with the superintendent of the exchange, within twenty-four hours after said award shall be recorded by him, a written notice of appeal, and the superintendent shall thereupon serve upon the board of appeals, and upon each party to the award appealed from, a written notice that an appeal therefrom has been made. Upon the receipt of such notice the board of appeals shall appoint a time and place for hearing the appeal, of which notice shall at once be served by the superintendent upon each party to the award appealed from. Any number of the board of appeals, not less than a majority thereof, shall be competent and sufficient for the consideration of an appeal and the concurrence of a majority of those serving shall be necessary and sufficient for a decision thereon. Said appeal may be considered and decided upon the evidence taken before the arbitrators or the arbitration committee, or upon new evidence in the discretion of the board of appeals, or of those members of the board serving *serving* 144 upon the consideration of the appeal, or a majority of them, and the hearing and consideration of the appeal may be adjourned from time to time in like discretion.

Appeals.

The decision upon an appeal shall be made within three days after the conclusion of the hearing thereof, and shall be in writing and subscribed by the members of the board of appeals concurring therein and shall be filed with the superintendent within twenty-four hours after it is made. The superintendent shall at once record such decision in the "Book of Decision- of the Board of Appeals," and at the same time shall serve a copy thereof upon each party to the award appealed from.

There shall be paid to the board of appeals as compensation for their services in each case the sum of thirty-five ($35) dollars, provided their decision is made and filed within the time specified in this section, which shall be divided equally between the members present and serving, and the board shall state in its decision which of the parties shall pay said fees or proportionate parts thereof; the superintendent shall collect from the party or parties the amount so assessed upon him or them, and shall pay the same to the secretary of the board.

SEC. 27. The arbitration committee, arbitrators appointed under article 2, of this title, and the board of appeals, when engaged in the examination of any subject referred to them respectively, under the provisions of this title, shall have power to summon and examine as a witness any member of the exchange, and if any member shall fail to obey such summons to at-

Power to call witnesses.

tend as a witness or refuse to give evidence, or having testified refuse to make affidavit, if required so to do, to the truth of his testimony, the arbitration committee, arbitrators, or board of appeals, as the case may be, shall at once report to the board of managers the fact of such neglect or refusal. The board of managers shall thereupon summon the members so neglecting or refusing to come before them and explain his reasons therefor, and if his explanation or excuse be not satisfactory the board of managers may, by a vote of two-thirds ($\frac{2}{3}$) of the members present and voting, suspend him from all the rights of membership for a term not exceeding one year.

Sale of membership under this article.

SEC. 28. When a sale of the rights of membership of any member is ordered, it shall be made by the superintendent of the exchange to the highest bidder at open outcry at the exchange room, after a notice of the date and hour of said sale shall have been posted for ten (10) days on the bulletin of the exchange. Any member may purchase the rights of membership of any other member, which shall give him the right to sell the same to any other member or member-elect.

TITLE 3.

Suspension and Expulsion.

Suspension and expulsion of members.

SEC. 29. Any member of the exchange may be suspended from all rights of membership for a term not exceeding one year, or may be expelled from membership in the exchange by the board of managers as hereinafter provided, and for any of the following causes:

(*a.*) For knowingly and wilfully violating, disobeying or disregarding any by-law or rule of the exchange.

(*b.*) For refusing to submit to and abide by any award or decision of any arbitrators, arbitration committee, board of appeals, or supervisory committee made and filed under the provisions of these by-laws.

(*c.*) For any other misconduct in his relations to the exchange, or any member or members thereof, or for any disreputable or fraudulent transaction with any person not a member of the exchange, of which complaint shall be made by not less than three members of the exchange either jointly or severally.

SEC. 30. If a complaint be made against any member of the exchange under this article, it must be in writing signed by the member or members making it, and specifically alleging the particular act or acts complained of. It must be addressed to the supervisory committee, and accompanied by all of the documentary evidence bearing upon the case in the possession of the complainant or complainants, and by a list of the witnesses by whom it is proposed to prove the allegations of the complaint.

The chairman of the supervisory committee shall thereupon serve

upon the member against whom the complaint is made a copy
147 of the complaint, and of the documentary evidence, and the list of witnesses accompanying it, and within five (5) days after such service the member against whom the complaint is made shall serve upon the chairman of the supervisory committee his answer, in writing, to said complaint, together with all the documentary evidence in his possession bearing upon the case, and a list of the witnesses by whom he proposes to disprove the allegations of the complaint.

Duties of supervisory committee under this act.

The chairman of the supervisory committee, as soon as expedient after the receipt of said answer, or if no answer is received, after the expiration of five (5) days from the date of service of the copy of the complaint, shall notify both parties and the witnesses named by each, of the time and place at which the committee will meet to act on said complaint. If after examination the committee shall be of the opinion that the allegations of the complaint are true and have been sufficiently proven, and that the member complained of has been guilty of misconduct under the provisions of this article, they shall so report in writing to the board of managers and shall deliver to the board all documents recovered by them as evidence in the case, and a brief summary of the facts established by the testimony. The committee shall have the same power to adjourn the hearing of the case from time to time and to compel witnesses to attend and testify before them, and having testified to make affidavit of the truth of their evidence as is given to arbitrators and the arbitration committee by the last preceeding article, and for a failure to obey such summons or to make such affidavit, if required, any member of the exchange may be proceeded with as in said last-mentioned article prescribed.

SEC. 31. Upon receiving the report of the supervisory committee the board of managers may, in its discretion, act upon the said report, and the documents and summary of facts therewith submitted, or may call before it the complainant and respondent and
148 their respective witnesses; but if one party be called before the board the other party shall also be notified to attend at the same time.

SEC. 32. If the board of managers shall be of opinion that the allegations of the complaint are true and have been sufficiently proven, and that the member complained of has been guilty of misconduct under the provisions of this article, it may, by a vote of two-thirds (⅔ds) of the members of the board present and voting, expel said member from the exchange, or suspend him from all rights of membership for a period not exceeding one year. All contracts for the future delivery of cotton in which the member so expelled is the sole seller or buyer, or the only member of the exchange in his firm, shall be closed and terminated as prescribed in the case of a deceased member.

Board of managers may expel or suspend.

SEC. 33. All interest in the property of the exchange, of any person expelled therefrom, as hereinbefore provided, shall, upon such

expulsion, revert to and vest absolutely in the exchange; and no transfer by such expelled member of the certificate or certificates of membership held by him so expelled shall be recognized or enforced by the exchange, or any of its officers, but annual dues and assessments shall accrue and be payable upon all membership owned by members under suspension in like manner as if they had not been suspended. Whenever any member shall be expelled from the exchange, the board of managers may in and by the resolution of expulsion fix a day and time, at which the right or rights of membership of the member thereby expelled shall be sold, and the same shall accordingly be sold as provided in section 28 of these by-laws.

Interest in property ceases.

The proceeds of such sale may be applied as follows:

1st. To the payment of any annual dues or gratuity fund assessments that may be unpaid, and the transfer fee ($25.)

149 2d. To the payment of any claims due by the expelled member to other members of the exchange, provided notice of such claims shall have been duly filed, and said claims duly proved, as provided in title 2 of chapter first of these by-laws.

3d. The remainder of said proceeds, if any, may be paid to the expelled member, his legal representatives or assigns.

SEC. 34. Any suspended member may be reinstated in his rights of membership by the board of managers by a vote of three-fourths (3-4ths) of the members of the board present and voting.

May be reinstated.

150 CHAPTER SECOND.

Government of the Exchange.

Title I.—Officers and and standing committees.

Article 1. Election of officers, their powers and duties.
" 2. Appointment of standing committees, their powers and duties.
" 3. The superintendent of the exchange.
" 4. Licenses.

Title II.—Meetings.

Article 1. Of the exchange.
" 2. Of the board of managers.
" 3. Prohibited appropriations.

Title III.—Business on the floor of the exchange.

Article 1. Exchange hours.
" 2. Visitors.
" 3. Representatives of absent members.
" 4. Holidays.

Title IV.—By-laws and rules.

Article 1. Of amendment of the by-laws.
" 2. Of adoption and amendment of rule.

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TITLE I.

Officers and Standing Committees.

ARTICLE I.

Election of Officers—Their Powers and Duties.

SEC. 35. There shall be held at the exchange room, on the 1st (1st) Monday of June in each year, an election for a president, vice-president, treasurer, and fifteen (15) managers, to serve for one year, one trustee of the gratuity fund to serve for three years, and for three (3) inspectors of election to serve at the next ensuing election.

Annual election.

At such annual election the polls shall be open from 11 a. m. until 3 p. m.

If the day above stated for the annual election shall in any year fall on a day designated by law as a public holiday for the purposes of presenting for payment, or acceptance, and protesting bills of exchange, bank checks and promissory notes, the said annual election shall in that year be held on the next business day after such public holiday.

SEC. 36. The annual election of officers shall be by ballot, and each member of the exchange, not under suspension at the time, shall be entitled to cast in person one vote on which shall be written or printed the names of the candidates whose election he desires, together with the titles of the respective positions which he wishes them to hold. The inspectors of election shall be present during the whole time that the polls are open, and shall record the
152 name of each member voting as he deposits his ballot, and, upon the conclusion of the voting, shall immediately count and canvass the ballots, and having reduced the result thereof to writing shall subscribe the statement thereof and post it upon the bulletin of the exchange. Those members who shall appear upon such count and canvass to have received a plurality of all the votes cast for the several offices shall be elected to fill said offices respectively.

SEC. 37. The officers elected at an annual meeting shall enter upon the duties of their respective positions upon the Thursday next succeeding the day of their election, and shall hold office until the Thursday next succeeding the election of their successors.

SEC. 38. The president of the exchange shall preside at all meetings of the exchange and of the board of managers. He may call a meeting of the exchange whenever he shall deem it necessary, and shall do so whenever directed so to do by the board of managers, or requested so to do in writing by twenty-five (25) mem-

Duties of president.

bers of the exchange (which request must state the object for which the meeting is to be called).

SEC. 39. The vice-president shall perform the duties of the president in case of the absence or disability of the latter. In case of the absence or disability of both the president and vice-president, the board of managers shall appoint a chairman *pro tem.*, who shall perform all the duties of the president during the continuance of such absence or disability.

Duties of vice-president.

SEC. 40. The treasurer shall receive all funds belonging or payable to the exchange, and deposit or invest the same, as treasurer, in such manner as the finance committee shall direct. He shall pay all bills against the exchange when certified by the finance committee or authorized by the board of managers. He shall have custody of the corporate seal, shall keep an account of all
153 receipts and disbursements in a book to be kept for that purpose, subject at all times to the examination of the finance committee and the board of managers; shall render a detailed report at each regular meeting of the board, and a general annual report at the close of each year, and, at the expiration of his term of office, shall transfer to his successor all funds, books, papers, and other property of the exchange that may be in his possession, and shall perform such other duties as by these by-laws are expressly imposed upon him.

Duties of treasurer.

In case of absence or inability of the treasurer, the board of managers shall appoint a treasurer, *pro tempore*.

In case a vacancy shall occur in the office of treasurer, it shall be filled by appointment by the board of managers, until the Thursday next succeeding the next annual election of officers.

SEC. 41. The board of managers of the exchange shall consist of the president, vice-president, treasurer, and fifteen (15) managers, elected at the annual election. At the first meeting of the board it shall appoint one of its number secretary, whose duty it shall be to keep accurate minutes of the meetings both of the exchange and of the board of managers, to cause notice of all meetings of the exchange to be posted upon the bulletin, and to give notice in writing to each manager of all meetings of the board. A majority of all the members of the board of managers shall constitute a quorum for the transaction of business.

Board of managers.

SEC. 42. The board of managers shall have general and entire management of the property and business of the exchange not inconsistent with the charter and by-laws; shall adopt such rules and regulations as they may deem advisable for carrying out the objects of the association, shall have power to hire or lease and fit up such rooms as may be required for the purposes of the exchange, and to appoint, and remove at pleasure such subordinate officers and employés as they may
154 deem necessary, and fix their compensation; and to do and

Shall have charge of the property.

perform all other acts which by the by-laws they are authorized or directed to do.

SEC. 43. Should any member of the board of managers fail to attend three (3) consecutive meetings of the board (of which written notices shall have been distributed to the members not less than three (3) hours prior to the time of meeting), the secretary of the board shall, within twenty-four (24) hours after the adjournment of said third consecutive meeting, notify said absent member in writing of the fact of his failure to attend, and if at the next meeting of the board such member (being within reach of the secretary's notice) shall fail, in person or by letter, to tender the excuse that his absence from said meetings was caused by sickness or absence from the city, or by such unavoidable engagements as shall in the judgment of the board be a sufficient excuse, the board may declare his office vacant and forthwith proceed to fill the vacancy. A member whose office shall have been so declared vacant shall not be eligible for re-election during the unexpired portion of the term for which he had been elected.

Office of absent member may be declared vacant.

The board of managers shall have power to fill, by appointment, at any meeting of which written notices have been distributed to the members of the board, any vacancy which may occur in the board or in the office of inspection of election, by death, resignation, or otherwise.

To fill vacancies.

ARTICLE II.

Appointment of Standing Committees—Their Powers and Duties.

SEC. 44. The board of managers, at its first meeting after the annual election, shall appoint the following standing committees:

155 1. Executive committee.
2. Finance committee.
3. Supervisory committee.
4. By-laws and rules committee.
5. Floor committee.
6. Appeal committee on classification, and classification committee.
7. Committee on membership.
8. Committee on information and statistics.
9. Committee on trade.
10. Quotation committees.
11. Arbitration committee.
12. Adjudication committee.
13. Board of appeals.
14. Warehouse and delivery committee.
15. Revision of quotations.
16. Appeal committee on print cloths.

And from time to time such other committees as it may deem advisable.

May change committee.

The board may at any meeting, by a vote of the majority of those present, change in whole or in part the composition of any committee except the adjudication committee and board of appeals, and shall so change the composition of the floor committee that one member thereof shall retire from office at the end of each month, and the vacancy so created shall be filled by the board.

Executive Committee.

SEC. 45. The executive committee shall be appointed from the board of managers, and, subject to the board, shall have the general supervision of the property, business, and affairs of the exchange, and shall make such reports and recommendations as, in their judgment, will best promote its interests; shall have the direction and supervision of all appointed officers and employés in the discharge of their respective duties, and see that all rooms
156 provided are suitably furnished and kept in good order for the accommodation of the exchange, the board of managers, and committees.

Finance Committee.

SEC. 46. The finance committee shall be appointed from the board of managers, and shall audit all bills against the exchange, examine and audit the accounts of the treasurer and superintendent monthly, and also the annual account of the treasurer, and shall exercise a general supervision over the financial affairs of the exchange.

The finance committee shall have power to purchase and cancel memberships at such rates as may from time to time be fixed by the board of managers.

Supervisory Committee.

SEC. 47. The supervisory committee shall consist of three (3) members, appointed from the board of managers, and shall have such powers and jurisdiction as are conferred upon it by chapter first of these by-laws.

The fees of the supervisory committee for each case submitted to it under article I., title II, chapter first, shall be fifteen dollars, and the committee shall in each case direct by whom and in what manner said fees shall be paid.

By-Laws and Rules Committee.

SEC. 48. The committee on by-laws and rules shall consist of the president and secretary (*ex officio*), and three (3) members of the board of managers, to whom shall be referred all proposed amendments to said by-laws and rules for their consideration, and report to the board.

157 *Floor Committee.*

SEC. 49. The floor committee shall consist of five (5) members of the exchange, one of whom shall retire at the end of each month; it shall have in charge the conduct of members on the floor of the exchange, shall maintain good order and decorum, and enforce all provisions of the by-laws and rules relating thereto; and shall have the power to impose a fine of not more than ten dollars ($10) for each offense, upon any member guilty of disorderly conduct, or in their discretion to make complaint against such member of the supervisory committee under title III., chapter first, of the by-laws.

Appeal Committee of Classification, and Classification Committee.

How formed.

SEC. 50. The appeal committee on classification shall be formed as follows, viz.: A panel of not less than twenty (20) members, experts and regularly engaged in handling spot cotton, shall be appointed by the board of managers; from which panel the superintendent shall draw by lot three (3) members to serve as an appeal committee on classification upon each case that may be appealed, as provided for in article III., chap. third.

The decision of this committee shall be final in all cases so appealed. If any member drawn by lot to serve on a case shall be unable to attend, the superintendent shall draw another name in his place.

Classification committee.

In addition to the committee provided for as above, the board of managers shall appoint a committee of three (3) members, to be known as the classification committee, two of whom shall constitute a quorum for business.

Duties of classification committee.

This committee shall hear and decide on all cases of appeal from rejections on account of quality or condition of cotton or bagging, and their decision shall be final, in so far as it affects any
158 parties in interest who may be represented in the examination of the rejected cotton, or in the arbitration regarding the same, for which they shall be paid by the party in error twenty-five (25) cents per bale. They shall also have charge of making up types, and shall be entitled to collect for each set five ($5) dollars. All fees collected by this committee shall be divided equally among the members serving on each case.

Secretary of committee.

The board of managers shall appoint the secretary of this committee, who shall be paid a salary to be fixed by the board, not to exceed twenty-five hundred ($2,500) dollars per annum, depending upon the amount of fees to the credit of the classification account on the treasurer's books.

It shall be the duty of the secretary to take charge of the classification-room, and of the types and samples therein contained; to receipt for all samples sent up to the appeal committee; to notify

the superintendent of each appeal; to hold said samples, subject to the order of the committee drawn to class such lots; to see that the seals of all samples are broken only by or in presence of said committee; to make out official reports of decisions by appeal committee; to send same to the respective parties in interest; to make out bills for classification fees; to send same to the superintendent for collection, and to keep a record of all transactions of appeal committee, and of all business done in the committee-room.

Duty of this secretary.

The appeal committee on classification and value of print cloths shall be formed as follows, viz.: A panel of not less than seven members, experts, shall be appointed by the board of managers, from which panel the superintendent shall draw by lot three members to serve as an appeal committee on classification and value upon each case that may be appealed, as provided for in chap. 5, art. 1, sec. 113.

159 *Committee on Membership.*

SEC. 51. The committee on membership shall consist of five members of the exchange, and shall have in charge all applications for membership, for powers of attorney and for representatives of members; they shall decide finally upon all such applications within one week from the date of their reception, and within twenty-four hours after they have agreed upon a decision; in case of an application for membership they shall transmit the same, whether approving or disapproving, to the secretary of the board of managers.

Committee on Information and Statistics.

SEC. 52. The committee on information and statistics shall consist of five (5) members of the exchange, and shall have in charge all matters appertaining to the supply of newspapers, market reports, telegraphic dispatches, and statist cal information for the use of the exchange; and it shall be the duty of this committee to organize and perfect plans for obtaining early, reliable and regular information affecting the price of cotton and print cloths from all cotton-producing and cotton-consuming sections.

Committee on Trade.

SEC. 53. The committee on trade shall consist of seven (7) members, one of whom shall be a member of the board of managers, and the chairman of the committee. They shall consider and report to the board of managers such rules and regulations for the purchase, sale, transfer, transportation, and custody of cotton and print cloths as will, in their opinion, best promote the interests of all parties interested in the cotton trade of the city of New York.

160 *Quotation Committees.*

SEC. 54. The quotation committee for spot cotton shall consist of

(7) members of the exchange, and shall meet at the exchange twice on each business day, except Saturday, when they shall meet once, to confer upon and by a vote of a majority of the members present establish the market quotations for the time being of good ordinary, low middling, and middling grades of upland cotton, which they shall immediately post upon the bulletin of the exchange, and at their final meeting for each day they shall also establish and post official quotations of grades of Upland, New Orleans and Gulf, and Texas cotton, as follows: Ordinary, strict ordinary, good ordinary, strict good ordinary, low middling, strict low middling, middling, good middling, strict good middling, middling fair, and fair; and also official quotations of grades of stained cotton, as follows: Good ordinary, strict good ordinary, low middling, and middling.

Early meeting.

Final meeting.

The committee on revision of quotations shall consist of eight (8) members more or less actively engaged in spot cotton business, who shall be elected by the board of managers, and shall serve together as a standing committee throughout the fiscal year of the exchange, subject to the provisions of section 44, article II., of the by-laws.

Revision committee.

The duty of this committee shall be to meet and act in conjunction with the quotation committee, at the second meeting of said committee, on Thursday of each week, and also at the call of the chairman of the quotation committee on any other day that the quotation committee may deem revision of grades desirable.

Its duties.

At any joint meeting of the two committees, a quorum of eleven (11) members shall be necessary to constitute a working joint committee.

Should a quorum not be present at any meeting calling for a revision of quotations, the place, or places, of the absent member, or members, may be supplied temporarily by the committee selecting a sufficient number to form a quorum.

In case of absentees.

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The committee on quotation of futures shall consist of five (5) members of the exchange. Their duties shall be to report to the superintendent, at 10.10 a. m. of each day, the tone and price of the contract market for transmission by cable to Europe. The committee shall meet each day at the close of exchange hours, to confer, and by a majority vote to determine the closing quotations for contracts for future delivery and report the same to the superintendent; and they shall have authority to establish quotations for any months of those called at the regular calls, but in which no transactions may have occurred during the exchange hours of that day.

Quotations of futures.

The committee on quotations of print cloths shall consist of three members, who, by a majority vote of those present, shall determine the official quotation of the various grades of print cloths recognized by the exchange in its contracts.

Arbitration Committee.

SEC. 55. The arbitration committee shall consist of seven (7) members of the exchange, from whom the two (2) arbitrators chosen by disputing parties shall in all cases choose the third as provided in article II., title II., chapter first. It shall be the duty of this committee to hear and determine such matters as shall be referred to it under article I., title II., chapter first, and to study the by-laws and rules of the exchange, and to keep themselves informed of all decisions made by arbitrators, committees, and the board of appeals and arbitation, especially to ascertain, by an examination of the "reports of arbitration committees" upon file at the exchange, whether any case which may be referred to arbitration has or has not been adjudicated upon, in whole or in part, within thirty (30) days before such reference is agreed upon.

How formed and general duties.

162 *Adjudication Committee.*

SEC. 56. The adjudication committee shall be appointed in the manner prescribed in the act of incorporation of the exchange, and shall have such powers and jurisdiction as are by that act conferred upon it.

Before entering upon the duties of the office, each member of the committee shall make, sign and file with the superintendent of the exchange, an oath or affirmation that he will fairly and faithfully hear, consider, and examine all matters in controversy which may come before him during his term of office, and upon each of such matters render a just and true award according to the best of his understanding.

As soon as practicable after its election the committee shall organize and shall appoint a member of the exchange, not a member of the committee, the clerk of the committee.

Any person who may desire the services of said committee shall file with the clerk of the committee an agreement, in writing, to submit their controversy to the committee, and to be bound by its decision, which agreement shall be signed by the parties thereto, and attested by a subscribing witness. On such an agreement being filed, the clerk shall call a meeting of the committee, to be held as soon as may be convenient to the parties concerned, and the committee shall thereupon hear and decide such controversy, and render an award thereon in conformity with sections 5, 6 and 7 of the act of corporation.

The committee shall be entitled to the sum of twenty-five dollars ($25), and the clerk five dollars ($5) for each sitting of the committee; said fees to be included in the award, and paid by the party against whom the award is given, unless the committee shall, in their discretion, otherwise decide.

The proceedings of said committee shall be recorded in a book to be kept for that purpose, in which shall be entered a summary of each controversy had before them, the award made thereon, and, at the discretion of the committee, the grounds

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for said award. Such book shall be the property of the exchange, and open at all times to the inspection of its members.

Board of Appeals.

SEC. 57. The board of appeals shall consist of seven (7) members of the exchange, and shall hear and finally determine all matters referred to it under article III., title II., chapter first of the by-laws.

Warehouse and Delivery Committee.

SEC. 58. The warehouse and delivery committee shall consist of five (5) members interested in the trade, one of the members of said committee to act as secretary, and to be paid a salary of not exceeding four thousand dollars ($4,000) per annum, at the discretion of the board of managers. Three members of said committee shall constitute a quorum.

Secretary.

It shall be the duty of this committee to examine into and pass upon all applications for licenses as warehousemen, weighers, samplers, truck-owners, owners of lighters, and head menders of cotton, and refer the same to the board of managers with their recommendation for final action; to adopt such rules and regulations for the guidance of licensed parties as they may deem necessary, and to report the same to the board of managers. Upon complaint of misconduct on the part of any person licensed by the exchange (which complaint must be reduced to writing and verified by the party making it) to summon the accused and accuser before them, to sit as a court of inquiry in such case or cases, take testimony under oath, and to submit the same, together with their recommendation, to the board of managers for its approval.

Duties.

The committee may, in its discretion, suspend the license of any party pending the final action of the board. This section shall apply to those handling print cloths.

164 ARTICLE III.

The Superintendent of the Exchange.

SEC. 59. The superintendent, who may be a member of the exchange, and who (if not a member) shall be eligible for election in the manner prescribed in title I., article II., section 2, shall be appointed to the board of managers at the first meeting after the annual election, or at any regular monthly meeting, in case a vacancy in the position should occur.

The superintendent of the exchange shall keep all accounts except those of the treasurer; shall act as general superintendent, and shall perform all the duties that are imposed upon him by these by-laws, or which shall be required of him by the board of managers.

ARTICLE IV.

Licenses.

SEC. 60. All parties engaged in handling cotton or print cloths for members of this exchange, including warehousemen, owners and captains (part owners) of lighters, weighmasters, samplers, truck owners, and head menders must be licensed by the board of managers as follows:

How obtained.

Every application must be properly indorsed by two members of the New York Cotton Exchange, and addressed to the warehouse and delivery committee. That committee, after examination into the character and qualification of the applicant, shall forward the application, with their approval or disapproval, to the secretary of the board of managers, and in the latter case shall specify the reasons for their action. If favorably considered by the board, it shall be returned to the committee with instructions to issue the license applied for, which license must be signed by the president of the ex-
165 change, and countersigned by the secretary of the warehouse and delivery committee. If not approved by the board of managers, it shall be returned to the committee with memorandum of disapproval indorsed thereon.

May be cancelled.

Any license issued under the provision of this article, may be cancelled at any time either by the board of managers or the party holding the license (except as to contracts existing at the date of notice) by a notice in writing, stating the intention to cancel, given by one party to the other, but a notice to cancel a warehouseman's license must be served at least thirty (30) days before the date therein specified as the date of cancellation.

Entitled to exchange floor.

Warehousemen holding licenses shall be entitled to admission upon the floor of the exchange (but without the right to vote at any meeting or election, or to buy or sell upon the exchange) upon the payment to the treasurer of the same annual dues and assessment as are imposed upon the members thereof, and shall be subject to all rules, by-laws, and arbitrations of the exchange concerning matters relating to their business under such licenses.

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TITLE II.

Meetings.

ARTICLE I.

Of the Exchange.

SEC. 61. An annual meeting of the exchange shall be held in the general meeting-room on the Tuesday preceding the election of officers and managers, at which the board of managers shall present

Annual meeting. a general statement of the affairs and finances of the exchange, together with an estimate of the expenses for the next ensuing year, and the amount of annual dues which the board recommend to be collected upon each membership for the said ensuing year, which amount may be increased or diminished, and shall be fixed by a vote of the exchange at said meeting, and the sum so fixed shall be due and payable on the Thursday next succeeding the election.

If the day above stated for the annual meeting shall in any year fall on a day designated by law as a public holiday for the purposes of presenting for payment or acceptance, and protesting bills of exchange, bank checks and promissory notes, the said annual meeting shall in that year be held on the next business day after such public holiday.

Other meetings. Other meetings of the exchange shall be held when called by the president or other presiding officer.

Hours and quorum. SEC. 62. All meetings of the exchange must be called to be held between the hours of 10 a. m. and 4 p. m., but may be adjourned or extended without limit. Not less than forty (40) members shall constitute a quorum of the exchange.

167 No notice shall be taken at any meeting of any resolution, unless it shall be submitted in writing and duly seconded.

Ayes and nays. The calling and recording of the ayes and nays shall be ordered upon the request of ten (10) members.

No member shall speak more than twice on any question under discussion, unless by consent of a majority of the members present.

ARTICLE II.

Of the Board of Managers.

Of the board of managers. SEC. 63. The stated meetings of the board of managers shall be held on the first (1st) Monday of each month, and the president or other presiding officer may call special meetings when deemed necessary, and shall do so when requested in writing by three members of the board.

Notices of all meetings of the board shall be in writing, served personally or at the offices of the members of the board, and posted on the bulletin of the exchange, not less than three (3) business hours of the exchange previous to such meeting.

ARTICLE III.

Prohibited Appropriations.

SEC. 64. There shall be no appropriation of money voted, either by the board of managers or the exchange, except for the strictly

legitimate business thereof; nor shall any sum of money be appropriated or paid for the engrossment of any complimentary resolutions.

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TITLE III.

Business on the Floor of the Exchange.

ARTICLE I.

Exchange Hours.

Business hours.

SEC. 65. The hours for opening and closing the exchange for the transaction of business shall be ten (10) a. m. and three (3) p. m., respectively, except on Mondays falling between the 1st day of June and the 1st day of October, on which days the hours for opening the exchange shall be eleven (11) a. m., and also, except Saturdays, throughout the year, on which days the hour for closing shall be two (2) p. m.

Trading out of hours forbidden.

Trading or offering to trade in contracts for the future delivery of cotton or print cloths by members of the exchange, on the floor of the exchange, after the hour of two (2) p. m., on Saturdays, and three (3) p. m., on other days of the week, is positively forbidden and prohibited, and any member violating this provision, shall upon complaint being made under title III., chapter 1st of these by-laws, be fined not less than twenty-five ($25) dollars, nor more than one hundred ($100) dollars, at the discretion of the supervisory committee, for each offense, or upon recommendation of the supervisory committee may be suspended or expelled at the discretion of the board of managers, for violation of by-laws, as provided in title III., sections 29 and 30.

Contracts not valid.

All contracts for the future delivery of cotton or print cloths, made or agreed to be made in other than the duly preseribed hours, shall be deemed invalid and not binding upon the members of the exchange, whether such contract be made or agreed to

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be made on the floor of the exchange, or elsewhere; nor shall any action to recover loss, or to establish claim to any contract made, except within the aforesaid hours, be entertained; and hereafter, if any arbitration be called to settle disputes arising from transactions in future deliveries, or if claims be registered to secure creditors of failed members, the party calling such arbitration, or registering such claim, must certify, in writing, that all contracts for, or transactions in future deliveries, with regard to which such dispute arose, or upon which such claim or claims are founded, were in accordance with the by-laws and rules of the exchange, and especially in accordance with the provision of this by-law.

No contracts other than those properly certified to shall be subject to arbitration by any arbitration committee, or to consideration by the supervisory committee, and the certificate shall have

Annual meeting. a general statement of the affairs and finances of the exchange, together with an estimate of the expenses for the next ensuing year, and the amount of annual dues which the board recommend to be collected upon each membership for the said ensuing year, which amount may be increased or diminished, and shall be fixed by a vote of the exchange at said meeting, and the sum so fixed shall be due and payable on the Thursday next succeeding the election.

If the day above stated for the annual meeting shall in any year fall on a day designated by law as a public holiday for the purposes of presenting for payment or acceptance, and protesting bills of exchange, bank checks and promissory notes, the said annual meeting shall in that year be held on the next business day after such public holiday.

Other meetings. Other meetings of the exchange shall be held when called by the president or other presiding officer.

Hours and quorum. SEC. 62. All meetings of the exchange must be called to be held between the hours of 10 a. m. and 4 p. m., but may be adjourned or extended without limit. Not less than forty (40) members shall constitute a quorum of the exchange.

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All contracts for the future delivery of cotton or print cloths, made or agreed to be made in other than the duly preseribed hours, shall be deemed invalid and not binding upon the members of the exchange, whether such contract be made or agreed to

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be made on the floor of the exchange, or elsewhere; nor shall any action to recover loss, or to establish claim to any contract made, except within the aforesaid hours, be entertained; and hereafter, if any arbitration be called to settle disputes arising from transactions in future deliveries, or if claims be registered to secure creditors of failed members, the party calling such arbitration, or registering such claim, must certify, in writing, that all contracts for, or transactions in future deliveries, with regard to which such dispute arose, or upon which such claim or claims are founded, were in accordance with the by-laws and rules of the exchange, and especially in accordance with the provision of this by-law.

No contracts other than those properly certified to shall be subject to arbitration by any arbitration committee, or to consideration by the supervisory committee, and the certificate shall have

reference alone to the hour at which the agreement was entered into, irrespective of the day or hour at which the contract or slip was signed.

ARTICLE II.

Visitors.

SEC. 66. Complimentary card of admission to the floor of the exchange, good for ten (10) days, and not transferable, may be issued by the superintendent, on application of a member, to non-residents of the city; but a second card of admission shall not be issued to any person within six (6) months after he shall have received such an one.

No member receiving a complimentary card of admission shall engage in any business on the floor of the exchange, and if he shall attempt to do so, a complaint having been made to the floor committee, and properly substantiated, the visitor so offending shall be at once excluded from admission to the exchange, and the member on whose application the card of admission was issued shall pay to the treasurer of the exchange a sum equal to the full annual dues for the current year.

ARTICLE III.

Representatives of Absent Members.

SEC. 67. Cards of admission to the floor of the exchange, not transferable, may be issued by the superintendent, with the approval of the committee on membership, to the *bona fide* partner or clerk of any member who may apply therefor.

Such cards are only to be used in case of absence from the city or illness of the member making the application, and confer no right upon the parties holding them to make purchases or sales on the floor.

Should any person holding such a card violate the provisions of this article, he and the member whom he represents shall be subject to such penalty or penalties as the board of managers in their discretion shall impose.

ARTICLE IV.

Holidays.

SEC. 68. All Saturdays, from and including the second (2d) Saturday of June, to and including the third (3d) Saturday of September in each year, shall be observed as holidays so far as concerns the issuing and transferring of notices and orders upon contracts for future delivery.

Saturdays in summer.

The exchange may, by a two-thirds vote, order a holiday which shall be binding upon all members, so far as regards any business in contracts for future delivery, in the following manner: A meeting of the exchange shall be held at least seven (7)

Exchange may order.

days previous to the date of the proposed holiday, one day's notice thereof having been sent to each member. The voting upon such proposed holiday shall be by ballot, and shall take place at the exchange room between the hours of 12 m. and 2 p. m.
171 on the first business day following that on which the meeting of the exchange was held. The superintendent of the exchange, or his assistant, shall act as teller, and shall record the names of the members voting, and the result shall be certified and posted as prescribed in article II., title I., chapter first, section 2.

Contracts falling due on holidays.

SEC. 69. All contracts falling due on Sundays, legal holidays, or such holidays as are prescribed by the by-laws, or ordered by the exchange, shall be completed on the preceding day, and when a notice of five (5) days is required, such notice shall be given at least five (5) days previous to the day preceding such holiday.

When the fifth day previous falls on holday.

SEC. 70. When the fifth day previous to the date of delivery falls on a Sunday, or holiday, the next preceding business day must be substituted for the issue and transfer of the transferable notice.

When the day of delivery falls on the day following a Sunday or holiday, the next preceding business day must be substituted for the termination of the circulation of transferable notices and warehouse orders.

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TITLE IV.

By-Laws and Rules.

ARTICLE I.

Of Amendment of the By-Laws.

SEC. 71. Any proposed new by-law, or amendment to an existing by-law, must first be submitted to, and considered by the board of managers.

If approved by a majority of the board a copy thereof shall be posted for ten (10) days upon the bulletin of the exchange, together with a notice of the time, after the expiration of said ten days, when a meeting of the exchange will be held for the consideration thereof.

At such meeting, after said proposed amendment or by-law shall have been discussed, and unless it shall be, by a vote of a majority of the members present and voting, referred back to the board of managers for alteration or amendment, the president or other presiding officer shall announce the day on which the said by-law or amendment shall be voted upon, which shall be within five (5) days from the day on which the meeting has been held.

The voting shall be by ballot, and each member, not under suspension, shall be entitled to cast, in person, one ballot in favor of or in opposition to the proposed by-law or amendment, and if two-thirds (⅔ds) of all the votes cast shall be in the affirmative, the proposed by-law or amendment shall be adopted.

The polls shall be open in the exchange room from 11 a.
173 m. until 2 p. m., and the superintendent of the exchange or his assistant shall act as teller, and shall record the names of the members voting. Two members of the board of managers, or of standing committees, shall be present at the counting of the votes, and shall promptly sign and post upon the bulletin of the exchange a certificate of the result of the voting.

ARTICLE II.

Of Adoption and Amendment of Rules.

SEC. 72. All rules adopted by the board of managers shall be in force, and be binding upon members of the exchange, and shall govern all cases to which they may be applicable, after they shall have been posted for ten (10) days upon the bulletin of the exchange.

Any alteration of the rules relating to contracts made under the provision of this article shall be binding on all contracts entered into before as well as after its adoption, provided such alteration does not effect the amount of money to be paid, or the quality of cotton or print cloths to be received under such contracts.

174 CHAPTER THIRD.

Transaction of Business.

Article 1. Form of contract.
" 2. Delivery of cotton on contract.
" 3. Classification of cotton on delivery.
" 4. Of the use of fictitious names.
" 5. Powers of attorney.
" 6. Reporting sales.
" 7. Samplers and weighmasters.
" 8. Service of notices and transferable orders.
" 9. Commissions.

175 ARTICLE I.

Form of Contract.

SEC. 73. No contract for the future delivery of cotton shall be noticed in any public report or printed circular, or in any manner recognized, acknowledged, or enforced by the exchange, or any committee or officer thereof, unless both parties thereto shall be members of the New York Cotton Exchange, and the contract shall be in the following form, viz:

(*Contract A.*)

OFFICE OF —— ——,
NEW YORK, —— —, 18—.

Sold for M—— ——

To M—— ——

45,000 lbs. in about one hundred square bales cotton, growth of the

United States, deliverable from licensed warehouse in the port of New York, between the first and last days of —— next, inclusive. The delivery within such time to be at seller's option, in lots of not less than fifty bales upon five days' notice to buyer. The cotton to be of any grade from strict ordinary to fair, inclusive, and if stained not below strict good ordinary, at the price of — cents per pound for middling, with additions or deductions for other grades, according to the rates of the New York Cotton Exchange existing on afternoon of the fifth day previous to the date of the warehouse order.

Either party to have the right to call for a margin, as the variations of the market for like deliveries may warrant, and which margin shall be kept good.

[Printed across the face in red ink.] For and in consideration of one dollar to — in hand paid, receipt whereof is hereby acknowledged, — accept this contract with all its obligations and conditions.

175½ This contract is made in view of, and in all respects subject to, the rules and conditions established by the New York Cotton Exchange, and in full accordance with article II., title IV., chapter second of the by-laws.

Respectfully,

—— ——,
Cotton Brokers.

Verbal contracts. Verbal contracts (which shall always be presumed to have been made in the foregoing form) shall have the same standing, force, and effect as written ones, if notice in writing of such contracts shall have been given by one of the parties thereto to the other party during the day on which such contract was made or the next business day thereafter.

ARTICLE II.

Delivery of Cotton on Contract.

SEC. 74. Cotton shall be receivable and deliverable in the city of New York, south of Fourteenth street, and on the river front south of Sixtieth street, or within the limits of the port of New York, only from or at such warehouses as may be recommended by the warehouse and delivery committee, approved by the board of managers and duly licensed, as provided by article IV., title I., chapter second.

Must be from licensed warehouse.

Nor shall any delivery of cotton upon contract for future delivery, or to arrive, be lawful unless said delivery is from or at a licensed warehouse, and, unless otherwise stipulated prior to the sale of spot cottons, the buyer may demand that the cotton purchased be delivered from or at a licensed warehouse.

Exceptions. Provided that members wishing to deliver cotton from dock, or from other open places above the level of the street, within the aforesaid lim-

its, may do so upon the following conditions: That the
176 seller furnish to the secretary of the warehouse and delivery committee a statement of the cotton to be delivered, the time and place selected for delivery, and the name of his broker, before 4 p. m. of the day previous to delivery, if such delivery is to commence before 12 m. of the next day; and before 10 a. m. of the day of delivery, if delivery is to take place after 12 m. of that day, in order that the secretary of said committee may detail a properly authorized person to take charge of such delivery to whom licensed parties shall report before commencing delivery, and who shall weigh, label, and mark samples, and weigh and deliver to proper owners all loose cotton and pickings; and the seller shall also, as a further condition, pay to the order of the secretary of the warehouse and delivery committee five (5) cents per bale for each and every bale so delivered.

Secretary to appoint person to take charge.

SEC. 75. Cotton which may have been stored below the level of the street shall not be a good delivery until after the same shall have been restored above the level thereof for a period of at least thirty (30) days.

Below the level of the street.

SEC. 76. Stained cotton not below strict good ordinary may be delivered on a contract, and, when so delivered, shall be settled for according to the rates of the New York Cotton Exchange existing on afternoon of the fifth day previous to the date of the warehouse order.

Stained cotton may be delivered.

ARTICLE III.

Classification of Cotton on Delivery.

SEC. 77. Every order for the delivery of cotton, on account of a contract for future delivery, on basis, must bear on its face the name of a member of the exchange, who will act as broker for the deliverer, and the last receiver of the order shall write on the face thereof the name of another member of the exchange who will act as broker for him.

Orders must have broker's name.

177 But no member who is interested as principal or as broker, or who has served as arbitrator in any contract for the future delivery of cotton, shall be competent to act as member of appeal committee on classification, in deciding any question of grade, quality, or condition of cotton, arising under such contract.

SEC. 78. All questions that may arise relating to the grades, quality, or condition of cotton on contracts for future delivery, and which shall require the examinations of samples for decision, unless otherwise agreed upon by the deliverer and receiver, shall be decided as follows:

Grade, quality or conditions decided.

The two brokers, acting for the deliverer and receiver, respectively, shall decide such questions as arbitrators, and if they fail to agree they shall select a third member of the exchange to act as arbitrator

with them, and the award of a majority of said arbitrators shall be final and binding, subject only to appeal to the appeal committee on classification, as to the classification of cotton delivered, as hereinafter provided.

The award must be made in writing, and shall be delivered to the broker for the receiver, and he shall at once serve copies thereof upon the receiver and deliverer.

On demand of either party the arbitrators may assess damages as compensation for improper tender or rejection at an amount not greater than one dollar per bale for each bale in excess of ten per cent. of the contract.

SEC. 79. All bales tendered, unless accepted by the sampler for the receiver, shall be regarded as rejected. Should the samplers fail to agree, the samples, with a statement of the question between them, shall be submitted to the brokers or arbitrators for decision, and such bales as they decide should have been received shall be taken.

When samplers disagree.

SEC. 80. The sampler for the receiver shall draw the samples, and from the bales delivered shall draw one sample large enough to be broken into two parts across the layer, and not parted with the layer; one part to be retained by himself and the other to be given to the sampler for the deliverer. When it shall be impracticable to draw one sample large enough, as above directed, two samples shall be drawn and the comparison made and agreed upon at the scale.

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Cotton shall be weighed before being sampled, and all loose or top samples made, or taken from bales in progress of delivery, shall be the property of the buyer, and in lieu of the set of samples received by the seller for the purpose of comparison and arbitration, he shall upon his bill to the buyer make an allowance of six ounces for each sample so received by him.

SEC. 81. When a question is referred to the brokers or arbitrators, the samples shall be promptly put up and exposed to the air for twenty-four hours without handling, and shall be ready for classification by 11 o'clock, a. m., on the second day after delivery, and shall be classed before 2 o'clock p. m. of the same day, unless a majority of the arbitrators shall for sufficient reasons of improper light postpone the time for classification. The two brokers who are to act as arbitrators shall meet at the office of the broker for the receiver, examine and compare the two sets of samples, and select by lot one set which shall be sealed up and used in case of an appeal.

Time to arbitrate.

The arbitrators shall then, at the office of the broker for the receiver, or at such other place as the majority of them shall agree upon, class the remaining set of samples.

SEC. 82. All questions that may arise relating to the grades, quality, or condition of cotton sold otherwise than by a contract for future delivery, and which shall require the examination of samples for decision, unless otherwise agreed upon by the

Cotton not sold on contract.

deliverer or receiver, shall be decided by three arbitrators who shall be members of the exchange, of whom the receiver and de-
179 liverer shall each appoint one, and the two so appointed shall choose the third by lot from the members of the appeal committee on classification, and an award of a majority of the arbitrators so chosen shall be final and binding, subject only to an appeal to the appeal committee on classification, as hereinafter provided.

The award must be made in writing, and shall be delivered to the arbitrator appointed by the receiver, who shall at once serve copies thereof upon the receiver and deliverer.

The fees of the arbitrators shall be fifteen dollars ($15), and six cents per bale additional for each bale classed in excess of 100 bales, and the award shall state by whom the fees are to be paid.

Either party may appeal.

SEC. 83. Either party may appeal to the appeal committee on classification from an award of arbitrators made under the provisions of this article.

The party appealing must notify the other party, in writing, of his demand, and state explicitly what that demand is, by 11 o'clock a. m. of the day following the receipt of the award, to which the opposite party shall have an opportunity to reply, and he may, before 2 o'clock p. m. of the same day, notify the party appealing, in writing, what concessions, if any, he is willing to make, and the propositions so made, signed by both parties, shall, unless such concessions are accepted, be sent in a sealed envelope to the appeal committee on classification, and shall not be opened until the decision and classification of said committee on the appeal is made.

The decision of the committee upon every case shall be reached as soon as practicable, and shall be made in writing, and filed with the superintendent of the exchange, who shall serve a copy thereof upon each party, and collect the fees of the committee, which shall be twenty (20) cents per bale for each contract or case submitted to their decision by mutual agreement or on appeal.

180 Of the fees so collected the superintendent shall divide fifteen (15) cents per bale, amongst the members of the appeal committee serving on the case, and the remaining five (5) cents per bale shall be paid over to the treasurer of the exchange, to be credited to classification account.

Settlements shall be made on the classification and decision of the committee, and the party whose proposition is furthest (in money value based on quotations on the day of delivery) from the decision of the committee, shall pay the fees of the committee on the appeal.

Standard dirt.

SEC. 84. In determining the classification of cotton delivered, the sand and dirt shall be taken into account. If cotton of a lower grade than is specified in the contract is received, settlement shall be made as if such grade had been included therein; but nothing in this section shall be so construed as to compel any one to receive other grades than those embraced in the contract.

Private arbitration. SEC. 85. Nothing in the by-laws or rules shall be so construed as to prevent parties between whom questions may arise relating to the grade, quality, classification, or condition of cotton, and requiring the examination of samples for decision, from submitting the same, by mutual agreement, and before any award has been made, to private arbitration, without right of appeal, or directly to the appeal committee on classification, provided that if the question has already been submitted to arbitrators or to the appeal committee on classification half the fees shall be paid by each party.

National cotton exchange types used. SEC. 86. The quotation committee shall give quotations of spot cotton, upland, New Orleans and Gulf, and Texas, on the basis of the classification now established by the National Cotton Exchange, and supplemented as regards the grades of middling fair, and fair, by the New York Cotton Exchange, and such classification and quotations shall constitute the basis of settlement of all transactions.

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ARTICLE IV.

Of the Use of Fictitious Names.

SEC. 87. No member of the exchange shall make a fictitious or fraudulent use of any name or names, to fill up the time, in the issue or transfer of any notice for the future delivery of cotton or print cloth on contract; and any member who shall be found guilty by an arbitration committee, or, if an appeal is taken, by the board of appeals, of such fictitious or fraudulent use of any name or names, shall, in each case, pay to the party with whom the notice may lodge at the close of the day, a penalty, by way of damages, of one-quarter ($\frac{1}{4}$) of one cent per pound on cotton and one-tenth ($\frac{1}{10}$) of a cent per yard on print cloths and in addition thereto may, upon a repetition of the offense, be suspended by the board of managers.

ARTICLE V.

Powers of Attorney.

SEC. 88. Any member of the exchange transacting business in contracts, as the representative of any house or firm in which he is not an advertised partner, must file with the superintendent of the exchange a duly executed power of attorney in the following form, viz:

UNITED STATES OF AMERICA,
State, City and County of New York.

Know all men by these presents that —— ——, of ——, do hereby constitute and appoint, and by these presents do make, constitute, and appoint —— —— of —— —— true and lawful attorney
181½ to represent — in the buying and selling of contracts for the future delivery of cotton, for — and in — stead, to perform

all necessary acts, as hereinbefore stated, in accordance with the by-laws and rules of the exchange, which — might legally do; hereby ratifying and confirming in all respects the act or acts of —— ——, said attorney, as fully as — could do if personally present, and this — power shall remain in full force and effect until after the expiration of twenty-four hours from the date of the posting upon the bulletin board at the exchange room, by the superintendent thereof, a notice of the revocation of the same.

SEC. 89. All transactions in contracts made under "the call," by a member holding a power of attorney, shall be binding upon his principal or principals; and all transactions in contracts made by such member not under "the call" shall also be binding upon his principal or principals, unless it shall be distinctly stated and agreed upon, in writing, by an exchange of slips at the time, that the transaction is for his own account.

ARTICLE VI.

Reporting Sales.

SEC. 90. All transactions in contracts for the future delivery of cotton under article I, chapter third, and for the future delivery of print cloths, chapter 5, article I, section 110, shall be reported promptly by the seller to the collector of the exchange, giving the exact time and terms, and the name of the party making the report only.

All contracts or slips must be signed by members of the exchange, (except as provided in section 91, second paragraph), having permanent offices in the city of New York and within the limits prescribed in article VIII, section 95, of these by-laws.

Any member who shall be found guilty of reporting false sales shall be expelled.

Seller to furnish contract. 182

SEC. 91. It shall be the duty of the seller, on the day on which transactions in contracts take place, to furnish a contract or slip, and deliver his own, already signed, the opposite one in blank, to the buyer; the latter shall then sign his contract, or slip and return it to the seller.

Slips must be signed by members or attorneys.

All slips or contracts must be signed by the member himself or his firm, except upon the following condition: That he or they, duly execute and file with the superintendent a special power of attorney, in such form as may be prescribed by the board of managers, authorizing signature of his or the firm name to slips or contracts bought or sold, said power to be valid and binding upon him or his firm until formally revoked, and notice of revocation publicly announced by being posted on the bulletin of the exchange.

SEC. 92. Daily, after the close of business at the exchange, a memorandum in writing must be given, by each party to the other, of all transactions on that day in contracts for future delivery.

SEC. 93. When a member of the exchange acts as a *a* broker for another, it shall be his duty to give his principal a memorandum of transactions for that principal's account, and it shall be equally the duty of the principal to get such a memorandum from his broker.

ARTICLE VII.

Samplers and Weightmasters.

SEC. 94. No samples of cotton drawn in the city of New York, or weighers' return of cotton weighed in said city, shall be arbitrated upon under the by-laws of this exchange, or in any way recognized by any officer or committee of the exchange, unless the said samples shall have been drawn, and the said return is signed by a
183 sampler or weighmaster licensed by the exchange as provided by these by-laws.

No member of the exchange shall employ any sampler or weighmaster other than one so licensed.

ARTICLE VIII.

Service of Transferable Notices and Warehouse Orders.

SEC. 95. Every member of the exchange shall keep on file with the superintendent of the exchange a designation of an office within half a mile of the exchange building; at which all notices and warehouse orders may be served upon him; and if any member shall fail to comply with the provisions of this section, the delivery of any notice or warehouse order to the superintendent of the exchange shall be considered a good service upon and delivery to him.

ARTICLE IX.

Commissions on Cotton Contracts.

SEC. 96. Commission shall be charged and paid under all circumstances, both upon the purchase and sale of contracts for future delivery of cotton, and where a "turn" involves two transactions, viz: a purchase and a sale, a commission must be charged on both, this rule being equally applicable to extension or transfer of contracts from one month to another.

The rates of commission shall be as follows:

Twelve and one-half cents per bale for each and every bale bought or sold, when the transaction is made for any party not a member of this exchange.

Seven and one-half cents per bale for each and every bale bought or sold, when the transaction is made for any member of the exchange who has not a permanent office established in the
184 city of New York within half a mile of the exchange, as prescribed by article VIII, section 95, of these by-laws, and recorded in accordance with the requirements of section aforesaid.

Two and one-half cents per bale for each and every bale bought

or sold, when the transaction is made for any member of the exchange who has his office permanently in the city of New York and within the limits and under the conditions prescribed in section 95 above quoted, except that where one member merely buys or sells for another (giving up his principal at or before 3 p. m. of the day of the transaction), and does not accept or carry the contract, the rate of commission shall be one cent for each and every bale thus bought or sold.

In any joint account transaction between a member and a party not a member, the regular commission of twelve and one-half cents per bale must be charged.

All partners not members must be charged the full rate of twelve and one-half cents per bale upon their individual business.

185 CHAPTER FOURTH.

Life Insurance and Gratuity Fund.

Article I. Trustees of the gratuity fund.
" II. Proofs of death.
" III. Assessments.
" IV. Gratuity fund.
" V. Payment of gratuities.
" VI. General provisions.

186 ARTICLE I.

Trustees of the Gratuity Fund.

This chapter took effect June 1st, 1883.

Election of trustees.

SEC. 97. At the next annual election of the exchange, there shall be chosen by ballot, in the manner prescribed for the election of officers and managers, three trustees, to be known as "trustees of the gratuity fund" of the New York Cotton Exchange, who shall immediately after their election determine by lot their several terms of office, which shall be for one, two and three years respectively; and at each succeeding annual election there shall be chosen by ballot in like manner one trustee, who shall hold office for three years.

Vacancies.

In case a vacancy shall occur, the board of managers shall fill the same until the next annual election, when a trustee shall be elected for the unexpired term. The term of office of each trustee elected under the provisions of this section, shall begin on the same day on which the terms of office of the officers chosen at the same election shall begin, and shall terminate on the same day on which the terms of the officers retiring from office in the same year as such trustees shall terminate.

Duties of trustees.

SEC. 98. It shall be the duty of the trustees of the gratuity fund to collect the assessments and pay out the gratuities hereinafter provided for, and to keep securely invested, in accordance with the laws of the State of New

York respecting trust funds, all moneys received by them for the gratuity fund, together with the interest, increase and income thereof. They shall annually choose one of their number to be a chairman, and, subject to the approval of the board of managers, shall make such rules as may be needful. They shall make a full report of the condition of the fund to the board of managers at least once in each year, and as much oftener as the board may require.

187 It shall be the duty of the finance committee in each year previous to the annual meeting, to examine the accounts and vouchers of the trustees of the gratuity fund, and to report in writing the result of such examination to the board of managers.

ARTICLE II.

Proofs of Death.

SEC. 99. Whenever any officer of the exchange shall receive information that any member of the exchange has died, it shall be the duty of such officer to promptly notify the trustees of the gratuity fund, who shall at once take steps to procure satisfactory proofs of the death of such member.

The trustees may in each case require the following proofs to be furnished, viz:

Proofs required. 1. An affidavit of the physician who attended the deceased member in his last illness, and at the time of his death.

2. An affidavit of the undertaker or other person who officiated at his funeral.

3. An affidavit of some reputable person who knew the deceased in his lifetime, to the effect that the person so deceased was in fact the member of the exchange reported to have died.

If, in the opinion of a majority of the trustees of the gratuity fund, the circumstances attending any particular case shall render it expedient that any of the foregoing proofs should be dispensed with, or that other or further proofs should be required, the trustees shall report such opinion, together with a statement of the facts and circumstances upon which it is based, to the board of managers, who shall thereupon, by resolution, direct said trustees, which, if any, of the foregoing proofs should be waived, or what other or further proofs should be required.

188 ## ARTICLE III.

Assessments.

SEC. 100. As soon as the trustees of the gratuity fund shall have received notice of the death of any member of the exchange they shall report the same to the board of managers, who

Assessments. shall, by resolution, levy an assessment of ten dollars upon every membership in the exchange, except the membership or memberships of the deceased member. A copy of said resolution shall be immediately posted on the bulletin of the

exchange, together with a notice of the day and hour of such posting signed by the superintendent of the exchange, and the assessments thereby levied shall thereupon become due and payable to the trustees of the gratuity fund. A notice of such assessment shall also be sent by the trustees by mail, to each member of the exchange, but the omission to send such a notice, or its non-receipt by any member shall not operate to release him from payment of the assessment, or extend his time for payment, or relieve him from the penalties hereinafter provided in case of non-payment.

Failure to pay assessments.

SEC. 101. Any member of the exchange who shall fail to pay any assessment levied as provided in the preceeding section upon the membership or memberships owned by him, within thirty days after the same shall have become due and payable, shall be notified of such failure by the trustees of the gratuity fund, and shall be deprived of all the privileges of the exchange until he shall have paid the same with interest from the date of levy. At the expiration of sixty days from the date of such notification, if the member so notified shall still fail to pay such assessment, the board of managers may declare his membership or memberships upon which said assessment remains unpaid at an end, and order the same to be sold, and after deducting from the proceeds of the sale the amount of such unpaid assessment, with interest, together with all other amounts due to the exchange or any committee thereof, for annual dues, assessments, fines or otherwise, or to members of the exchange holding valid claims under the by-laws, place the balance thereof to the credit of said member, payable without interest to him, or to his creditors or legal representatives.

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No certificate of membership shall be transferred upon the books of the exchange until all assessments levied upon the membership represented thereby under the provisions of this chapter, shall have been paid with interest thereon.

ARTICLE IV.

Gratuity Fund.

SEC. 102. The gratuity fund of the New York Cotton Exchange shall consist of the amounts levied and collected as hereinbefore provided, and the interest and increase thereof.

When the gratuity fund shall amount to a sum equal to three hundred dollars multiplied by the number of memberships in the exchange, the annual income of said fund, or so much thereof as the board of managers may direct, shall be credited *pro rata* among the memberships in the exchange in reduction of the payments provided for by this chapter.

Whenever the number of deaths in any one year shall exceed two per cent. of the whole number of memberships in the exchange, the trustees of the gratuity fund shall pay and advance out of that fund such sum or sums as shall be necessary to limit the total number of assessments upon each membership in such year to two per cent. of

the whole number of memberships in the exchange, provided, however, that if the gratuity fund shall be or become exhausted, the liability of each membership to assessment on each death shall continue, notwithstanding such assessments may exceed said two per cent. in one year.

190 SEC. 103. All necessary expenses incurred in the collection of assessments, and the management of the gratuity fund, shall be paid out of that fund.

ARTICLE V.

Payment of Gratuities.

SEC. 104. The trustees of the gratuity fund shall receive the assessments levied, as hereinbefore provided, as the same shall be paid in, or otherwise collected, and shall pay therefrom to the person or persons entitled thereto, as provided in the acts amending the act incorporating the New York Cotton Exchange, the following sums:

$1,000—If the member shall have died within one year after June 1, 1883.

$1,500—If such member shall have died after one year and within two years from June 1, 1883.

$2,000—If such member shall have died after two years and within three years from June 1, 1883.

$2,500—If such member shall have died after three years and within four years from June 1, 1883.

$3,000—If such member shall have died after four years and within five years from June 1, 1883.

$3,500—If such member shall have died after five years and within six years from June 1, 1883.

$4,000—If such member shall have died after six years and within seven years of June 1, 1883.

$4,500—If such member shall have died after seven years and within eight years from June 1, 1883.

$4,750—If such member shall have died after eight years and within nine years from June 1, 1883.

$5,000—If such member shall have died after nine years from June 1, 1883.

The trustees may, in their discretion, pay out any of the
191 foregoing sums in installments from time to time as the assessments are collected, and shall not be necessary for them to defer payment of any of said sums until the expiration of one year from the receipt of satisfactory proofs of death, although they may, in their discretion, so defer such payment.

SEC. 105. Before paying out any of the foregoing sums, or any portion thereof, the trustees of the gratuity fund shall require satisfactory proofs to be presented to and lodged with them, that the person or persons claiming to be entitled thereto are in fact so entitled, under the provisions of the acts amending the act incor-

porating the New York Cotton Exchange. The trustees may in each case require a decision or decree of the surrogate, or judge of probate, or other officer having jurisdiction of the estates of intestates in the county in which the deceased member shall have been domiciled at or immediately previous to his decease; but, if in the opinion of a majority of said trustees the circumstances attending any particular case shall render it proper that the foregoing proof should be dispensed with, and that other proofs should be accepted in lieu thereof, the trustees shall thereupon report such opinion, together with a statement of the facts and circumstances upon which it is based, to the board of managers, who may, by resolution, authorize said trustees to waive the proofs hereinbefore specified, and to accept other proofs in lieu thereof.

In case no widow, child or next of kin of any deceased member shall present and properly substantiate a claim for the payment of the gratuity hereinbefore specified, the whole amount assessed and collected on the death of such member shall be and remain a part of the gratuity fund.

ARTICLE VI.

General Provisions.

SEC. 106. The membership or memberships of a deceased
192 or suspended member from the date of his death or suspension until transferred on the books of the exchange shall be subject to assessment as hereinbefore provided; and in case any member shall die while under suspension, the same assessment shall be levied and collected, and the same payment made to his widow, children or next of kin as are hereinbefore provided, notwithstanding such suspension; but no assessment shall be levied upon the death of, and no payment shall be made to the widow, children or next of kin of any person who, having been a member of the exchange, shall have ceased to be a member before his death, either by expulsion or by the voluntary or forced sale and transfer of his membership.

SEC. 107. It is hereby declared to be the meaning and intention of this chapter, that any member owning more than one membership shall be required to pay assessments upon each membership owned by him, but in case of the death of a member owning more than one membership, his widow, children, or next of kin, shall be entitled to receive the same amount, and no more, that they would have been entitled to receive, if such member had owned only one membership.

SEC. 108. This chapter, being sections 97 to 108 both inclusive, shall take effect on June 1, 1883.

193 *Print Cloths.*

Chapter V.

ARTICLE I.

SEC. 109. No offer to buy or sell shall be entertained at a less dif-

ference than $\frac{1}{100}$ of a cent per yard, or for a smaller quantity than 1,000 pieces.

Form of Contracts.

SEC. 110. No contract for future delivery of print cloths shall be noticed in any public report or printed circular, or in any manner recognized, acknowledged or enforced by the exchange or any committee or officer thereof, unless both parties thereto shall be members of the exchange; and all contracts, unless otherwise stipulated, shall be in the following form:

"Office of —— ——,

NEW YORK, —— —, 18—.

Sold for —— ——

To —— ——

45,000 yards in about 1,000 pieces of print cloth, manufacture of the United States, deliverable from licensed warehouse in the port of New York between the first and last days of —— next inclusive; the delivery within such time to be at seller's option upon five days' notice to buyer. The said pieces of print cloth to be of the grades of best extra, 64 squares, extra, 64 squares, and standard, 64 squares, at the price of — cents per yard for extra, 64 squares, with additions or deductions for the other grades, according to the official quotations of the New York Cotton Exchange, existing on the afternoon of the fifth day previous to the date of the warehouse order.

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"Either party to have the right to call for a margin, as the variations of the margin for like deliveries may warrant, and which margins shall be kept good.

"This contract is made in view of, and in all respects subject to the rules and conditions established by the New York Cotton Exchange, and in full accordance with art. 2, title 4, chap. 2, of the by-laws.

Respectfully, —— ——, *Brokers.*"

Verbal contracts (which shall always be presumed to have been made in the foregoing form), shall have the same standing, force and effect as written ones, if notice in writing of such contract shall have been given by one of the parties thereto to the other party during the day on which such contract was made, or the next business day thereafter.

SEC. 111. Print cloths shall be receivable and deliverable in the city of New York south of Fourteenth street, or within the limits of the port of New York, only from or at such warehouses as may be recommended by the warehouse and delivery committee, approved by the board of managers, and duly licensed, as provided by art. 4, title 1, chap. 2d; nor shall any delivery of print cloths upon contract for future delivery be lawful unless said delivery is from or at a licensed warehouse, provided that members wishing to deliver from dock or from other open places within the aforesaid limits

How deliverable.

may do so upon the following conditions: That the seller furnish to the secretary of the warehouse and delivery committee a statement of the print cloths to be delivered, the time and place selected for such delivery before 4 p. m. of the day previous to delivery, if such delivery is to commence before 12 m. of the next day, and before 10 a. m. of the day of delivery, if delivery is to take
195 place after 12 m. of that day, in order that the secretary of said committee may detail a properly authorized person to take charge of such delivery, to whom licensed parties shall report before commencing delivery; and the seller shall also, as a further condition, pay to the order of the secretary of the warehouse and delivery committee, two dollars per contract of print cloths so delivered.

SEC. 112. Every order for the delivery of print cloths on account of a contract for future delivery must specify on its face the grade intended to be delivered, and only one grade of cloths shall be delivered on a single contract.

Inspection. SEC. 113. The party receiving said order shall have the right to demand the detail by the secretary of the warehouse and delivery committee of a regular licensed inspector of print cloths, who shall carefully inspect the said print cloths so tendered, and shall give a copy of his report after such inspection to both parties interested in said delivery; the fees for such inspection and report shall be four dollars per contract. In case either party to said delivery shall be dissatisfied with the report of the said inspector, he or they may appeal to the appeal committee on classification and value of print cloths. The party appealing must notify the other party in writing of his demand, and state explicitly what that demand is, by 11 o'clock a. m. of the day following the receipt of the report of the said inspector, to which the opposite party shall have an opportunity to reply, and he may before 2 o'clock p. m. of the same day notify the party
Appeal. appealing, in writing, what concessions, if any, he is willing to make, and the propositions so made, signed by both parties, shall, unless such concessions are accepted, be sent in a sealed envelope to the appeal committee on classification and value of print cloths, and shall not be opened until the decision and classification of said committee on the appeal is made. The decision of said committee upon every case shall be final and
196 shall be made as soon as practicable in writing and filed with the superintendent of the exchange, who shall serve a copy thereof on each party and collect the fees of the committee, which shall be twelve dollars for each contract submitted to their decision by mutual agreement or on appeal. Of the fees so collected the superintendent shall divide nine dollars amongst the members of said appeal committee serving on the case, and the remaining three dollars shall be paid over to the treasurer of the exchange to be credited to print-cloth classification account. Settlement shall be made on the classification and decision of the said committee, and the party whose proposition is furtherest in money value from the decision of the committee, shall pay the fees of such appeal.

SEC. 114. Nothing in the by-laws or rules shall be so construed as to prevent parties between whom questions may arise as to the value or classification of print cloths, from submitting the same by mutual agreement to private arbitration without right of appeal, or directly to the appeal committee on classification and value of print cloths.

SEC. 115. Commission shall be charged and paid under all circumstances, both upon the purchase and sale of contracts for future delivery of print cloths, and where a "turn" involves two transactions, viz: a purchase and a sale, a commission must be charged on both, this rule being equally applicable to the extension or transfer of contracts from one month to another.

Commission. The rates of commission shall be six dollars for each and every contract bought or sold when the transaction is made for any party not a member of this exchange, or for the "round term" twelve dollars; two dollars for each and every contract bought or sold when the transaction is made for any member, or four dollars for the "round turn," except that where a member merely buys or sells for another (giving up his prin-
197 cipal at or before 3 p. m. of the day of the transaction) and does not accept or carry the contract, the rate of commission shall be fifty cents for each and every contract thus bought or sold.

In any joint account transaction between a member and a party not a member, the regular commission of six dollars per contract or twelve dollars for the "round turn" must be charged.

All partners not members must be charged the full rate of six dollars per contract on their individual business, or twelve dollars for the "round turn."

SEC. 116. It shall be the duty of the board of managers, on the recom-endation of the warehouse and delivery committee, to license such inspectors and measurers of print cloths as may be necessary to carry on the business, and it shall be the duty of the warehouse and delivery committee, before recommending any such persons for such licenses, to find out that they have the requisite knowledge and are fully competent to perform the duties required of them.

198 *Rules of the New York Cotton Exchange.*

Form of order to buy or sell contracts.

Rule 1. Every order, given to a member of the New York Cotton Exchange, to buy or sell a contract for the future delivery of cotton as agent or broker of the party giving the order, shall be in the following form:

"Subject to the rules and by-laws of the New York Cotton Exchange, make for my account, and, as often as cancelled, replace, a contract for the sale [purchase] of one hundred bales of cotton deliverable [receivable] in [July]."

And every verbal or other order which does not in terms follow the foregoing form shall be presumed to have been given in that form, unless an express agreement to the contrary be proven.

Offers to buy or sell.

Who must be accepted.

Rule 2. All offers to buy or sell cotton for future delivery on the floor of the exchange, must be open to the member first accepting such offer. Unless the member, being the holder of only one membership, has a notice posted of his intention to transfer the same; while such notice remains posted, no other member shall be compelled to accept his contract. Any dispute arising from such offer, except on call, must be settled by the member making the offer submitting the question to the members present; the decision of the majority voting shall govern.

199 All offers to buy or sell cotton for future delivery shall be in cents or decimal fractions of a cent; and no transaction in contracts shall be permitted wherein the difference in price shall consist of a smaller fraction than one one-hundredth ($\frac{1}{100}$) of one per cent. per pound for each pound of cotton represented by such contract or contracts, nor shall any additional moneyed consideration whatever be allowed.

Transactions varying from the market not reported.

Any transactions made in any month above the price at which such month is offered, or below the price that is bid for such month, until what is offered shall be taken, or what is bid for shall be supplied, shall not be deemed the market price for such month or months, and shall not be reported in the record of transactions.

Any dispute arising from such transactions shall be referred to the committee on quotations of future deliveries, and its decision shall be final.

Original margins.

Rule 3. Either party to a contract for the future delivery of cotton, shall have the right to call an original margin of from one to five dollars per bale at the time of signing the regular contract (§ 73, by-laws), or at any time prior thereto, and may also demand that one dollar per bale of the amount so called shall, within one hour after the receipt of such demand, be deposited with the superintendent of the exchange in current funds or a certified check. The party calling must put up and deposit an amount equal to that called by him. Margins may be called and shall be put up on verbal contracts and on a slip as memorandum of contracts in all respects as is herein prescribed in case of a regular contract.

Provided that all demands for original margins on verbal contracts or slips must be made within twenty-four (24) hours after the transactions upon which such original margins are called.

Canceling contracts and ring clearances.

Contract binding.

Rule 4. All contracts for the future delivery of cotton shall be binding upon members, and of full force and effect until the

200 quantity and qualities of cotton specified in such contract shall have been delivered, and the price specified in said contract shall have been paid. Nor shall any contract be entered into with any stipulation or understanding between the parties, at the time of making such contract, that the terms of such contract as specified in § 73 of the by-laws are not to be fulfilled, and the cotton delivered and received in accordance with said section. Provided, however, that any party holding a contract against another, corresponding in all respects, except as to price, with one held by the other party against him, may close or cancel both by

Rings. giving notice, in writing, to the opposite party, at any time before notice of delivery; or where a "ring" may be formed the price must be within $\frac{25}{100}$c. of the market price for like deliveries at the time, and all parties thereto shall be compelled to settle upon the terms hereinafter prescribed.

All "ring" clearances shall be made at the bid prices posted by the superintendent at 1 p. m. on the day on

Ring prices and payments. which the "ring" is made, and bills on "rings" or direct settlements shall be rendered by 11 a. m. of the day after that on which such "ring" or settlement shall have been made, and must be paid by 2 p. m. of the day on which they are rendered, under a penalty of $\frac{6}{100}$c. per pound as liquidated damages.

The party making a "ring" shall notify all the parties thereto, and get their initials in acknowledgment, leaving with each a copy thereof. If the "ring" is not complete, he shall, on the same day, notify all the parties thereto. The contract of the earliest date shall in all cases be the one considered settled.

Margins may be called after a "ring" is formed until differences are paid. All parties paying differences shall be al-

Margins. lowed a discount from the date of payment to the first day of the month named in the contract, at the rate of six (6) per cent. per annum.

Any party who, at the request of another, trans-

Transfer fee. fers a contract or substitutes another for one held by him shall receive five (5) cents a bale as com-

201 pensation for making the change, but this transfer fee shall not be paid by any member who, in the legitimate discharge of his duty as a broker, tenders the name of his principal before the close of the exchange hours on the day on which the transaction was made.

All brokerages for making settlements, transfers, and changes in contracts shall be paid by the party employing the broker.

Where a transfer of contract or a "ring" has been verbally agreed upon by all the parties, and all have been notified, it shall be in force from the time of the time of the acknowledgment, and cannot be broken by the failure of any party thereto.

No clerk or other representative employed by members to ring out contracts under this rule shall be admitted to the room provided by the board of managers for that purpose, unless he holds a certificate from the executive committee, signed by the chairman, and

which has not been cancelled. Any disorderly conduct or other impropriety in the room or passage on the part of such clerk or representative, shall be reported to said committee, and, if proved to their satisfaction, shall immediately cancel the certificate, and cause a notice of their action to be posted, after which the offending party shall not be again admitted to the room.

Margins.

Rule 5. When a contract provides for demanding a margin, notice in writing requiring the same must be delivered at the office of the party from whom the margin is called, and if the office of the party is unknown or closed, it shall be delivered to the superintendent of the exchange, who shall indorse thereon the time of its receipt and promptly post the same on the bulletin of the exchange. When such notice is given before 12 o'clock m., the margin must be deposited one hour before the closing of the exchange; when notice is given after 12 o'clock m. the margin must be deposited before 12 o'clock m. of the next day, except in cases of calls for one dollar per bale original margin as provided for in rule 3, which must always be deposited within one hour from the receipt of a demand therefor. The superintendent of the exchange shall, every day, at 11 a. m. and 1 p. m., post on the bulletin of the exchange the bidding price for each month dealt in, and if there are no bids the last sale reported. These prices shall govern all calls for margin. All margins called before 12 m. shall be put up at the prices posted at 1 p. m. of the same day, and all margins called after 12 m. shall be put up at the prices posted at 11 a. m. of the following business day.

Time to call and deposit.

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If any party fails to deposit any margin called for in accordance with the contract and rule 3, the other party may close the cantract at his option, by given written notice of his decision to do so. The party in default shall then account to the other party for the difference between the contract price and the average quotations of the cotton exchange for that day, for like deliveries, with an allowance against the defaulting party of $\frac{25}{100}$c. per pound.

Failure to deposit.

The passing of any transferable notice shall not prevent the calling of margins on contracts any time before the day of delivery.

Rule 6. When margins are called for variations in the market, certified checks must be drawn to order of the bank or trust company to be designated by the party calling, which bank or trust company must be in good standing at the time at which they are to be deposited.

Certified checks for original margins and margins called as above must be sent to the superintendent of the New York Cotton Exchange, who shall deposit them, and get a "certificate of deposit," made payable on the order of the superintendent of the New York Cotton Exchange and to the order of the buyer and seller. As soon as

How to deposit.

the superintendent has received the certificate, he shall send
203 it to the party making the deposit and an abstract of same to the party calling the margin. In settlement, the superintendent shall ascertain the amount due each of the parties at interest, and shall indorse the amount due each on the certificate
Release. over his own signature, as instructed by both parties. In case the two parties do not agree as to the amount due each on such certificate, either of them may refer the matter to an arbitration committee for decision, with the right of either party to appeal from their decision to the board of appeals. On the decision of an arbitration committee, if not appealed from, or that of the board of appeals, if appealed to, the superintendent shall promptly indorse to each party the amount each shall be entitled to by such decision. Original margins are at the risk of the party depositing them.

At risk of party to whom due. Margins deposited for variations in the market are at the risk of the party to whom the money was actually due each day. In case of failure of any bank or trust company in which margins have been deposited, it shall be the loss of the party or parties to whom it may be found due, taking the average price of like deliveries on the day such bank or trust company failed, as a basis of settlement.

Members calling margins may, upon receipt of the superintendent's abstract of the certificate of deposit, verify the same by enquiry either directly of the party depositing, or of the trust company or bank in which the margin may have been deposited; and it shall be the duty of the party so depositing to give all such necessary information.

The exchange shall not be liable to members for any losses they may incur from any cause under this rule.

Transferable notices.

Rule 7. Where notice of delivery on part of seller, or demand of cotton by a buyer, when he has option so to do, is required
204 by a contract, it shall be given by the party furnishing the cotton in the one case, and by the buyer in the other case, to the party requiring said notice, before 10 a. m. of the fifth day prior to the delivery, except that should the fifth day fall
Time to issue. on a Monday, between the first of June and the 1st of October, the notice must be given to the party requiring same before eleven (11) a. m. of that day (but in no case shall a notice be issued that will allow less
Must have three days. than three business days for transfer, including the day of its date).

The party receiving the notice may transfer the same to a subsequent party, and it may be given from one transferee to another. Every transfer must be made promptly within twenty minutes and every person receiving the notice shall indorse upon it the time he receives it. Any party who may fail to forward such notice within that

time shall be liable to a penalty of $\frac{25}{100}$c. per pound or to have the notice returned to him at the option of the party with whom the notice shall lodge at the close of the day. All transfers shall be made within exchange hours. The notice becoming a short notice with the close of the exchange on the day of its issue. All differences thereon to be paid as provided for in rule 4, paragraph second, for payment of ring clearances. When sold as short notice the payments must be made direct, and the price made equal to that at which it was first issued. Should the office of the party to whom notice is to be given be closed, it shall be good service to give the notice to the superintendent of the exchange. He shall indorse thereon the day and the time of its receipt, and post notice thereof on the bulletin of the exchange.

To transfer.

All notices must be for 45,000 or 22,500 pounds of cotton.

Transferable notice.

— o'clock, New York, —— —, 188–.

To C. & Co.:

205 Take notice that on —— we shall deliver you 45,000 pounds in about one hundred square bales cotton in accordance with the term of our contract sale to you dated —— at — cents per pound. We pledge ourselves to deliver warehouse order to the last holder of this notice upon presentation of the same to us between the hours of 11 a. m. and 12 m. o'clock of the —— being the day previous to that of delivery. The cotton is to be received and held by the last acceptor hereof as custodian for us insured for whom it may concern, and subject to our order until we are paid at the rate of — cents per pound.

F. G. & CO.

Conditions.

In consideration of one (1) dollar paid to each of the acceptors, receipt of which is hereby acknowledged, it is agreed that the last acceptor hereof will between the hours of 11 a. m. and 12 m. o'clock on the day preceding the — present the within notice to F. G. & Co., receive the warehouse order for the cotton therein named, and on the following day receive the cotton and hold the same as custodian and agent for the said F. G. & Co., insured for whom it may concern and subject to their order until they are paid full the amount of — cents per pound and to settle with them on the basis of middling, with allowance for variation of grade in accordance with quotations of the New York Cotton Exchange existing on afternoon of fifth day previous to date of warehouse order. It is further agreed that each acceptor hereon shall continue his (or their) liability to each other for the fulfillment of the contracts until this notice shall have been returned to F. G. & Co., and a warehouse order specifying the cotton to be delivered received by the last acceptor hereof from F. G. & Co., at which time all responsibilities of intermediate parties shall cease.

C. & CO.

206 Form of transfer.

— o'clock, New York, —— —, 188–.

Messrs. I. S. & Co.:

We accept the above with all its conditions and obligations, and you will please take notice that in accordance therewith we shall deliver you 45,000 pounds in about one hundred square bales cotton on account of our contract sale to you, dated ——. The cotton to be paid for at the price of transferable notice.

C. & Co.

Issue and transfer. If tendered by the drawer before exchange hours on the fifth day before delivery of cotton is due, or if tendered by transfer as short notice before 11 a. m. of the day before the delivery of cotton is due, shall be accepted by any member of the exchange to whom cotton is due under any contract; and the price shall be made equal to the price of the contract on which it shall be tendered provided that it is otherwise in accordance with such contract; and the amount of cotton delivered on such notice shall be accepted as so much received on account of the contracts specified in the notice and transfers. Any party holding such notice and failing to present the same to the drawer thereof before 12 m. of the day before the one specified therein for delivery of cotton shall settle for such cotton on the average price of that day for the like

Failure to present order. delivery with $\frac{25}{100}$c. per pound in favor of the seller; and each party issuing or transferring the same shall collect that amount from the party to whom they issued or transferred such notice in settlement, the contract to remain in full force.

The superintendent of the exchange shall at the close of each day post on the bulletin of the exchange the price at which transferable notices shall be issued on the day following. The price so posted shall be within $\frac{25}{100}$c. per pound of the closing price of the market.

Settlements.

207 Rule 8. When the settlement of a contract depends upon the market price on a particular day, the average quotations of the New York Cotton Exchange on that day for like deliveries, as declared by the official record of the superintendent of the exchange, is to be taken as the basis of

Failure to deliver. settlement. In case of failure to deliver any portion of the cotton named in the contract when due, no obstacle having been made by the buyer, the basis of settlement of cotton due on such contract for default in delivery shall be $\frac{25}{100}$c. per pound above the average quotations for spot cotton of the day of delivery. And if failure to receive

Failure to receive. any portion of the cotton named in contract shall prove to be the fault of the buyer, the settlement shall be made at the average quotations for spot cotton of the day following, with the addition of $\frac{25}{100}$c. per pound in favor

of seller. Provided, however, that no seller shall be entitled to receive penalty, unless he has given the stipulated notice of intention to deliver; and no buyer (who has not received notice), unless demand is made by him two days before expiration of the contract. Provided, also, that no defaulting party can claim settlement under this rule, except upon evidence that the default was unintentional and not premeditated. Nothing, however, in this rule shall be construed to prevent a settlement by mutual agreement.

Notice must be given.

Offsets and substitutions. Any member who may find that he holds for account of his correspondents, contracts, both of sale and purchase in same month which offset each other, shall be authorized to offset and settle such contracts and to substitute therefor other names than those to, or from whom he originally sold or purchased; provided, that in such cases he shall be deemed guarantor to his principals for the strict fulfillment of such contracts, and shall be liable to them for all damage or loss they may sustain by reason of such substitution.

Quotations for sale reports.

Rule 9. The reported sales for each month, as made each day during exchange hours shall be taken as the full day's report,
208 and shall govern the superintendent in making the average quotations of that day for time contracts. When no sales for any month are reported at the exchange, the committee on future quotations shall fix the quotations for such month, if required.

Terms of deliveries on contracts.

Rule 10. On all contracts calling for deliveries in lots of not less than 50 bales, the deliveries must be made in lots of not less than 50 bales on the same day, and at one place, provided that when a delivery has been made on account of a contract, the balance to finish the contract shall be taken as a proper delivery, though it be less than 50 bales; and two orders taken at the same time for delivery on the same day, making together 100 bales from two places, shall be taken as a proper delivery if both such places be south of Fourteenth street and in the city of New York, or in Brooklyn, not more than two (2) miles apart; otherwise the entire contract for 100 bales must be delivered at one place. No one order for cotton to be delivered on contract shall be for a larger quantity than 45,000 pounds. All orders from warehouse or other place of delivery, upon which 5 days' notice shall have been given, must be delivered to the first receiver before 12 m. of the day before the cotton is due. And all contracts on which orders shall not be delivered in accordance with these stipulations, and all transferable notices (under rule 7), if presented, on which orders on warehouse or place of

Quantity to be delivered on an order.

Time.

Orders not delivered.

delivery shall not be delivered to the receiver, as stipulated above, shall be settled at the average quotation for spot cotton of the day the cotton is due, with the addition of $\frac{25}{100}$c. per pound against the defaulting party. Provided that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional and not premeditated. Nothing, however, in this rule shall be construed to prevent a settlement by mutual consent.

When no notice is given.

When no notice is given the delivery shall be made on the last day stipulated in the contract.

209 The party so delivering shall present to the first receiver a transferable notice before 11 a. m. of the business day next before that of delivery. All transfers must be made as provided in rule 7, for regular 5-day transferable notice, and the party with whom it may lodge at the close of exchange hours of that day must present it to the drawer thereof before 4 p. m. and receive a warehouse order for the cotton. Differences on the transferable notice to be paid as provided for in rule 4, for payment of differences on ring clearances and payments for the cotton to be secured as provided in rule 11, and variations in grade shall be in accordance with those existing on afternoon of fifth day previous to date of warehouse order.

Sales specified for delivery on same day may be delivered on orders not subject to above rule, as to issue and transfer.

Time for payment of cotton delivered on contracts.

Rule 11. The contract price of cotton delivered on time contracts and the approximate value of any other cotton

Time for payment.

delivered shall be payable on the day following delivery, provided weigher's return and bill are presented before 12 m. of that day, except where payment on delivery is required, in which case the party delivering shall give notice of his intention to exact the same, by an indorsement upon the warehouse order; and before tendering a delivery of the cotton upon the contract he shall afford to the opposite party ample opportunity to examine, sample, reweigh, and otherwise satisfy himself that the cotton tendered is merchantable, and in all respects, in full accordance with the said contract; this done, and the cotton in position for immediate delivery, with a receipted bill and weigher's return attached in readiness, the delivery and payment shall be simultaneously made; or, if mutually agreed

Approximate amount may be deposited.

upon, an approximate amount may be deposited in a trust company as security—the certificate made payable to the

210 order of either party, as the superintendent of the exchange may direct, who shall hold the same in trust, and upon the day following delivery, shall indorse and pay over to the party delivering, or so much thereof as may cover the amount of his bill, provided the stipulations in reference to the presentation of bill with weigher's return, as contained in the first part of

this rule, have been fulfilled. Cotton shall
At risk of buyer. be at the risk of buyer after it has passed the scale in course of delivery, except where payment upon delivery is exacted, in which case no risk is to attach to the buyer until the delivery and payment is consummated.

Nothing in this rule in reference to the liability of either buyer or seller, before or after the cotton has passed the scales of the weigher, shall be construed as preventing an agreement to the contrary, if the same is expressly agreed upon in writing.

Deliveries on contracts.

Rule 12. Cotton delivered on contract shall be so delivered and received only by the samplers of the brokers employed in such delivery or receipt. No
Principals shall not interfere. principal, either by himself or through any sampler, clerk, or any other agent, shall be allowed to interfere in such delivery, by word or deed, directly or indirectly, and in case of such interference the delivery or receipt of cotton upon the contract in which such interference shall take place, shall be at once stopped, and the principal so interfering shall pay to the other party a penalty of one-half ($\frac{1}{2}$) cent per pound on all the cotton not delivered thereon at the time such interference takes place.

Seedy and fraudulently packed cotton.

Rule 13. Fraudulently packed cotton and bales which have in them over five (5) pounds of seed or gin-fall, shall
How graded. be rejected and not be deliverable, and when mixed packed cotton is in the bale, the whole bale shall be
211 deemed of the grade of the poorest quality, and if that is below the lowest grade called for in the contract, or shown in the samples at the time of sale, it shall not be deliverable (except in the case of seed or gin-fall, as above provided).

In the event of disagreement between the samplers of the brokers, employed in the delivery and receipt of cotton,
Disagreement of samplers. as to the quantity of seed or gin-fall in any bale or bales, the settlement of the question shall be left to the brokers themselves, and if they fail to agree, a third broker, mutually agreed upon, shall decide finally on the question. The full weight of seed or gin-fall decided to be in any bale, shall be deducted by the weighmaster.

Either party can require any bale to be opened, and the actual quantity of seed or gin-fall to be ascertained, in which event, all expense and loss shall be paid by the party whose broker's sampler is shown to be in error.

False or fraudulently packed cotton is defined as follows: Such bales as may contain any foreign substance,
False packing defined. water-packed bales, or bales containing damaged cotton in the interior without any indication of such damage upon the exterior of the bale; also

such bales as are plated or composed of good cotton upon the exterior and decidedly inferior cotton in the interior of the bales in such manner as not to be detected without opening or boring the bales.

Bands, ropes, and bagging.

Rule 14. Six iron bands or ropes, not exceeding in weight 12 pounds in the aggregate, shall be considered sufficient for each bale of cotton. Any excess shall, at the option of the buyer, be removed from the bale or deducted from its gross weight.

All unnecessary bagging shall be removed from the bales before they are weighed, or a fair and equitable deduction be made for weight of same.

The usual side pieces not to be considered unnecessary bag-
212 ging (side pieces should each consist of no more than a single half width of bagging running the whole length of the bale), nor shall three full widths of bagging be considered unnecessary, provided they only run the length of the bale, the heads being protected by head pieces of a single thickness of cloth; but three full widths of bagging, lapping each other at the heads, shall subject the bale to a deduction of 2 pounds. Unnecessary bagging shall be understood to mean all bagging not absolutely essential to cover and protect the contents of the bale in a proper manner, while in an uncompressed condition.

Weight.

Rule 15. No bale of cotton weighing less than 300 pounds shall be deemed merchantable, and any buyer may refuse to receive the same.

Hours for the delivery of cotton.

Rule 16. The day on which the cotton is due the delivery shall not be required to commence before 8 a m., nor to continue later than sunset. Cotton shall be delivered or received at the rate of not less than 20 bales per hour, from each scale, when required by buyer or seller. When the seller requires the buyer to receive cotton from two scales, at one place of delivery, on one order, it must be noted on the delivery order.

Delivery delayed by weigher for dishonest sampler.

In case a delivery of cotton on contract be delayed by a weigher for dishonesty on the part of any licensed sampler (as provided in paragraph 4, of the rules for the guidance of weighers), and the delay be such as to prevent the completion of the delivery within the time specified for deliveries of contracts, the settlement for any portion not fulfilled shall be made as provided in rule 8, and the party paying such penalty, shall be entitled to recover same from the broker who employed the unfaithful sampler, provided that said broker be promptly notified by the warehouse and delivery committee of the sampler's misconduct.

213 Weather suitable for delivery.

Rule 17. If the weather be deemed unsuitable for the delivery of cotton, by any party interested in a delivery, on any day, the superintendent of the exchange, at their request, shall obtain the opinion thereon of three members of the exchange (not interested in deliveries on that day), and if a majority decide that the weather be unsuitable for the delivery of cotton, the superintendent shall post their certificate on the bulletin of the exchange, dating the time of posting, which shall remain posted until a majority of said three members shall decide the weather to be suitable, when it shall be taken from the bulletin and filed, noting the time of removal. During the time such certificate is posted on the bulletin, all deliveries of cotton may be suspended, at the option of either party to any delivery; and any delivery suspended under this rule shall be entitled to an extension of time—two hours more than the time such certificate was posted. The superintendent shall give a certified copy of said certificate to any member requiring it, on the receipt of 50 cents, and such copy shall be a sufficient authority for the suspension and resumption of delivery of any lot of cotton by the parties to the delivery.

Time allowed for taking delivery.

Rule 18. All cotton shall be received within ten days of date of purchase.

Compensation for grades on average price.

Rule 19. When cotton of various grades is sold by sample, at an average price, and, for proper causes, rejections are made, and such rejected bales are from the grades better than the average, the seller shall make good to buyer the difference in value; and if the rejections are from grades below the average, the buyer shall make good to the seller the difference.

214 Sales of cotton to arrive.

Rule 20. The following shall be the contract in all cases for cotton to arrive, where no other form of contract is specified at the time of sale.

Form of contract.

NEW YORK, —— —, 18—.

Sold for M —— ——

To M —— ——

— bales cotton to arrive, to be taken from a licensed warehouse or warehouses, by the buyer, after having been weighed by seller, upon any day (Sundays and legal holidays excepted), if notified by the seller before three o'clock p. m., provided the whole lot, or as much as twenty-five (25) bales are ready for delivery. It is mutually agreed by both parties that if the cotton covered by this contract should arrive in more than one parcel, each shall constitute a sepa-

rate lot, for which a distinct bill shall be rendered, and, if desired, an independent arbitration.

In case of loss of cotton. In the event of the loss, from any cause, of the cotton named in the contract, said contract shall be canceled without prejudice to either party; but if the loss is only partial, the contract shall remain in full force and effect, to the extent of such portion as may be saved and arrive consigned to and under the control of the seller: provided it arrives in merchantable order, or may be put into such condition, in the opinion of three competent and disinterested parties, without an undue sacrifice upon the part of the seller.

Nothing in this rule shall be construed to apply to cotton sold to arrive within a stipulated period of time, provided such period of time has expired.

Claims for irregularities.

Rule 21. After cotton has been examined, received, and passed upon by the broker or agent of the buyer, no claim shall be made against the seller except for fraudulent packing. When a claim is made it shall be in writing and shall state the particulars of the fraudulent packing, the marks by which the cotton was sold, and all other legible marks and numbers. It shall also state the loss sustained by reason of the fraud; such loss being based upon the difference in market value at the date of its discovery, between such bale and a bale of cotton of similar grade, sound and in good condition. Such difference in value shall constitute the claim, regardless of the original cost of the cotton, or of any fluctuations in the market, of the prices of cotton.

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Any claim made in accordance with the above, and verified by oath or affirmation, shall be deemed *prima facia* valid in favor of the claimant, and it can only be defeated by the decision of an arbitration committee, or the board of appeals.

Provided, that in all cases of claims for fraudulent packing, the party making claim shall have the right to return, or the seller to demand the return of such bale or bales. If, upon examination by the committee on classification, it be ascertained that such claim is well founded, the seller shall receive back the cotton, paying cost of transportation, both from and returning to New York, and shall deliver other bales of the grade originally sold, and as nearly as practicable, to the same aggregate weight of cotton; the settlement of differences to be based upon the quotations for similar grade on the day on which the discovery of the fraud is made. In all other cases the settlements to be made as provided for above. Any claims of this nature shall be good, against all sellers, for nine months from date of sale, provided that due notice of the existence of fraudulent packing be forwarded to them within eight (8) days of the discovery, and the date of such discovery of fraud shall be incorporated in the sworn or affirmed certificate.

Claims must be made within nine months.

216 Transit and free-on-board cotton.

Rule 22. Transit cotton, when offered for sale, should be accompanied by a memorandum giving the name of the vessel, ports of loading and destination, rate of freight, where insured, and rate of insurance, marks and quantity of each mark, and total weight when known.

If the amount of insurance is not stated, the buyer shall consider, and the seller shall guarantee, the cotton insured for not less than the price at which it may have been sold. The seller shall cause additional insurance to be made when so requested in writing, and in the event of loss or damage before the time named in the contract for delivery of the documents, the cotton shall be considered the property of the buyer, who must pay for the same promptly on presentation of shipping documents as specified in the contract, the seller then transferring the insurance to the buyer, who shall accept the responsibility of the underwriters from time of purchase.

If the buyer does not pay for the cotton at the time named in the contract, the seller shall have the option to make other disposition of the same, holding the buyer responsible for any loss he may sustain.

In case of the arrival of the cotton at the port of destination before the seller shall have delivered the shipping documents to the buyer, the landing expenses incurred at said port are to be borne by the purchaser, but it shall be the duty of the seller, at the time of sale, to state (when within his knowledge) if the cotton has sailed from port or ports of loading, or arrived at port or ports of destination, or if any accident has occurred to vessel or cargo; failing to do so, he shall become responsible for all such proper expenses as may be incurred by reason of such neglect on his part; and for neglecting to give such information, the buyer shall have the option of cancelling the contract before the documents are delivered.

Seller guarantees samples.

The seller shall guarantee the correctness of the samples shown, and it shall be the duty of the broker to seal them promptly, and they are

217 only to be opened for comparison with samples to be drawn at the port of destination, under the inspection of referees, whose name shall be specified in the contract, and whose decision shall be final; all claims for difference shall be void if the samples are opened without the consent of seller or seller's referees.

Unsealed samples shall not be removed from the office of the broker in the original sale, for resale through another broker or otherwise, without consent of the seller.

All claims for difference in samples, if accompanied by proper vouchers, must be paid by seller within three days from presentation.

Bill rendered.

A bill or invoice for the cotton must be rendered to the buyer as soon as practicable after sale, accompanied by a sworn or licensed weigher's certificate of weights, and shall be paid for within seven days after sale, on delivery of shipping documents.

Free-on-board sales shall be subject to the same terms and conditions of marine insurance and guaranty of samples which attach to cotton sold *in transitu*.

Difference in grade.

Settlements for difference in grades shall be determined by the quotations of the New York Cotton Exchange on the day the bill of lading is dated, which must be mailed not later than two days after its date; payment shall be made on presentation of the shipping documents, upon receiving one day's notice, unless otherwise agreed upon at the time of sale.

When sales are made for a specified grade, or by type samples, the buyer shall have the right to reject the cotton tendered, if the quality falls off more than half a grade, but in exercising this privilege he must release the seller from the fulfillment of the contract, unless the buyer is willing to receive it at a proper allowance, but no allowance shall be made to the seller if the cotton proves to be better than the grade or type stipulated, unless otherwise agreed upon at the time of the sale.

When the difference in the value of cotton falls within a
218 half a grade of a specified grade, the difference in the value of the cotton tendered shall be adjusted according to the quotations ruling in New York on the day the samples are arbitrated upon.

Country damage.

When claims are presented for so-called "country damage" the certificate of the weigher or shipping clerk at the time of shipment, corroborated by the bills of lading, shall be taken as "*prima facie*" evidence of the condition of the cotton. Failure to obtain remedy from the vessel for delivery at port of destination in improper condition as to exterior of the package, shall not invalidate the original evidence.

Ship's name given.

Whenever cotton is sold for ship or ships, or for shipment before a specified date, the name of the ship or ships, and the marks of the cotton, if not previously declared, shall be given in writing by the seller to the buyer before 12 o'clock noon, of the tenth (10th) day after the day or month named in the contract; or if more than one month is named then after the actual month of shipment.

The term ship or ships includes steamer or steamers.

Rates of brokerage.

Rule 23. The following rates of brokerage shall govern all transactions between members unless otherwise expressly stipulated: Upon all sales of spot cotton, to arrive, transits and free on boards, twenty-five (25) cents per bale shall be paid by both buyer and seller, which shall cover the charge for broker's services in attending to receipt and delivery of the same.

Upon all contracts for future delivery and settlement of same, brokerages shall be paid only by the party employing the broker.

All offers to buy or to sell for future delivery in the exchange must be free of brokerage unless otherwise stipulated.

Upon delivery of cotton upon contracts an additional brokerage

of twelve and one-half (12½) cents per bale shall be paid by
219 each party delivering or receiving the same. Brokerages upon contracts for future delivery shall be due, and may be collected as soon as contracts are accepted; and after payment upon all other transactions.

Calls.

Rule 24. There shall be three (3) public calls for the sale and purchase of cotton contracts at the exchange room on all business days, viz.: at the hour prescribed for opening the exchange; at 12 m., or immediately after receiving report of the first meeting of the quotation committee on spots, and at 2 p. m., or immediately after receiving the second daily quotation of the said committee, except that on all Saturdays throughout the year, there shall be only two (2) calls, the first immediately upon the opening of the exchange, and the second at 12.30 p. m., to be conducted by the superintendent, or, in his absence, by a person to be selected by the president or vice-president.

The call shall be by months, beginning with that current, and continued through the list of months so far as there is a desire to trade.

After the months are called there shall be a repetition of the same, as in the first instance, at the close of which the call shall be adjourned till the hour fixed for the next stated call.

The first offer to sell or buy at a price shall be first accepted before subsequent offer at same figures may be placed. Offers to sell or buy may be withdrawn (if not accepted) at the option of the parties offering.

Subsequent offers to sell at a lower or buy at a higher shall vacate prior offers to sell at a higher or buy at lower prices. A transaction shall vacate all previous bids and offers.

All disputes as to offers, acceptances, or withdrawals (whether in time or not) shall be decided upon the spot by the officer (or person presiding for the time being), subject to an appeal to the members present.

220 If an appeal is taken, the question shall be put promptly, and a majority of the members present, and voting upon the disputed point, shall settle the same finally.

Cotton delivered on contract to be classed as a "lot."

Rule 25. All cotton delivered on contracts and requiring an examination of samples (*vide* chapter third, title III., by-laws) shall be classed as a "lot" and not "bale by bale"—with differences "on" or "off," the decision to be governed by the quotations established by the quotation committee.

Marks of respect for deceased members.

Rule 26. On the death of a member of the exchange, the superintendent shall cause the flag of the exchange to be placed at half

mast, and an obituary notice, with a statement of the time and place of funeral, to be posted on the bulletin board.

The main room, or committee rooms of the exchange, shall be granted by the superintendent, on request of six members, for the purpose of holding meetings to express respect for a deceased member, such meetings to be organized and conducted by the members present. Any meeting in the main room, for the purpose named in this rule, must be held after business hours.

Form of order to buy or sell contracts for print cloths.

Rule 27. Every order given to a member of the New York Cotton Exchange, to buy or sell a contract for the future delivery of print cloths as agent or broker of the party giving the order, shall be in the following form:

"Subject to the rules and by-laws of the New York Cotton
221 Exchange, make for my account, and, as often as canceled, replace, a contract for the sale [purchase] of 1,000 pieces of print cloths deliverable [receivable] in [July]."

Verbal orders. And every verbal or other order which does not in terms follow the foregoing form shall be presumed to have been given in that form, unless an express agreement to the contrary be proven.

Offers to buy or sell.

Rule 28. All offers to buy or sell print cloths for future delivery on the floor of the exchange, must be open to the member first accepting such offer, unless the member being the holder of only one membership has a notice posted of his intention to transfer the same; while such notice remains posted no other member shall be compelled to accept his contract. Any dispute arising from such offer must be settled by the member making the offer submitting the question to the members present; the decision of the majority voting shall govern.

All offers to buy or sell print cloths for future delivery shall be in cents and decimal fractions of a cent; and no transaction in contracts shall be permitted wherein the difference in price shall consist of a smaller fraction than one one-hundredths ($\frac{1}{100}$) of one cent per yard for each yard of print cloths represented by such contract or contracts, nor shall any additional moneyed consideration whatever be allowed.

Original margins.

Rule 29. Either party to a contract for the future delivery of print cloths shall have the right to call an original margin of from one hundred to two hundred dollars at the time of signing the regular contract (chap. 5, sec. 2 of by-laws), or at any time prior thereto, and may also demand that fifty dollars of the amount so called shall, within one hour after the receipt of such demand, be deposited with the superintendent of the exchange in current funds or a
222 certified check. The party calling must put up and deposit an amount equal to that called by him. Margins may be

called and shall be put up on verbal contracts and on a slip as memorandum of contract in all respects as is herein prescribed in case of a regular contract.

Provided that all demands made for original margins on verbal contracts or slips must be made within twenty-four (24) hours after the transactions upon which such original margins are called.

Canceling contracts and ring clearances.

Rule 30. All contracts for the future delivery of print cloths shall be binding upon members, and of full force and effect until the quantity and qualities of print cloths specified in such contract shall have been delivered, and the price specified in said contract shall have been paid. Nor shall any contract be entered into with any stipulation, or understanding between the parties, at the time of making such contract, that the terms of said contract as specified in chap. 5, sec. 2 of the by-laws on print cloths are not to be fulfilled, and the print cloths delivered and received in accordance with said section. Provided, however, that any party holding a contract against another, corresponding in all respects, except as to price, with one held by the other party against him, may close or cancel both by giving notice, in writing, to the opposite party at any time before notice of delivery; or where a "ring" may be formed the price must be within $\frac{25}{100}$c. per yard of the market price for like deliveries at the time, and all parties thereto shall be compelled to settle upon the terms hereinafter prescribed.

Ring settlements. All "ring" clearances shall be made at the bid prices posted by the superintendent at 1 p. m. on the day on which the "ring" is made, and bills on "rings" or direct settlements shall be rendered by 11 a. m. of the day after that on which such "ring" or clearances shall have been made, and must be paid by 2 p. m. of the day on which they are rendered, under a penalty of $\frac{6}{100}$c. per yard as liquidated damages.

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The party making a "ring" shall notify all the parties thereto, and get their initials in acknowledgment, leaving with each a copy thereof. If the "ring" is not complete, he shall, on the same day, notify all the parties thereto. The contract of the earliest date shall in all cases be the one considered settled.

Margins. Margins may be called after a "ring" is formed until differences are paid. All parties paying differences shall be allowed a discount from the date of payment to the first day of the month named in the contract, at the rate of six (6) per cent. per annum.

Substitution. Any party who, at the request of another, transfers a contract or substitutes another for one held by him shall receive $2 per contract as compensation for making the change, but this transfer fee shall not be paid by any member who, in the legitimate discharge of his duty as a broker, tenders the name of his principal before the close of the exchange hours on the day on which the transaction was made.

All brokerages for making settlements, transfers, and changes in contracts shall be paid by the party employing the broker.

Cannot be broken. Where a transfer of contract or a "ring" has been verbally agreed upon by all the parties, and all have been notified, it shall be in force from the time of the acknowledgment, and cannot be broken by the failure of any party thereto.

Margins.

Rule 31. When a contract provides for demanding a margin, notice in writing requiring the same must be delivered at the office of the party from whom the margin is called, and if the office of the party is unknown or closed, it shall be delivered to the superintendent of the exchange, who shall endorse thereon the time of its receipt, and promptly post the same on the bulletin of the exchange. When such notice is given after 12 o'clock m., the margin must be deposited one hour before the closing of the exchange. When notice is given after 12 o'clock m., the margin must be deposited before 12 o'clock m., of the next day, except in cases of calls for $50 per contract original margin as provided for in rule 29, which must always be deposited within one hour from the receipt of a demand therefor.

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When and how to deposit.

Failure to deposit. If any party fails to deposit any margin called for in accordance with the contract and rule 29, the other party may close the contract at his option, by giving written notice of his decision to do so. The party in default shall then account to the other party for the difference between the contract price and the average quotations of the cotton exchange for that day, for like deliveries, with an allowance against the defaulting party of $\frac{10}{100}$c. per yard.

The passing of any transferable notice shall not prevent the calling of margins on contracts any time before the day of delivery.

For variations. Rule 32. When margins are called for variations in the market, certified checks must be drawn to order of the bank or trust company to be designated by the party calling, which bank or trust company must be in good standing at the time at which they are to be deposited.

Certified checks for original margins, and margins called as above, must be sent to the superintendent of the New York Cotton Exchange, who shall deposit them and get a "certificate of deposit," made payable on the order of the superintendent of the New York Cotton Exchange and to the order of the buyer and seller. As soon as the superintendent has received the certificate, he shall send it to the party making the deposit and an abstract of same to the party calling the margin. In settlement, the superintendent shall ascertain the amount due each of the parties at interest, and shall indorse the amount due each on the certificate over his own signature, as instructed by both parties. In case the two parties do not agree as to the amount due each on such certificate, either of them may refer the

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Releasing.

matter to an arbitration committee for decision, with the right of either party to appeal from their decision to the board of appeals. On the decision of an arbitration committee, if not appealed from, or that of the board of appeals, if appealed to, the superintendent shall promptly indorse to each party the amount each shall be entitled to by such decision. Original margins are at the risk of the party depositing them.

At whose risk. Margins deposited for variations in the market are at the risk of the party to whom the money is actually due each day. In case of failure of any bank or trust company in which margins have been deposited, it shall be the loss of the party or parties to whom it may be found due, taking the average price of like deliveries on the day such bank or trust company failed, as a basis of settlement.

Transferable notice for print cloths.

Rule 33. Where notice of delivery on part of seller, or demand of print cloths by a buyer, when he has option so to do is required by a contract, it shall be given by the party furnishing the print cloths in the one case, and by the buyer in the other

Time to issue. case, to the party requiring said notice before 10 a. m. of the fifth day prior to the delivery, except that should the fifth day fall on a Monday, between the 1st of June and the 1st of October, the notice must be given to the party requiring same before eleven (11) a. m. of that day, but in no case shall a notice be issued that will allow less than three business days for transfer, including the day of its date.

The party receiving the notice may transfer the same to a subsequent party, and it may be given from one transferee to

226 another. Every transfer must be made promptly within twenty minutes, and every person receiving the notice shall endorse upon it the time he receives it. Any party

To transfer. who may fail to forward such notice within that time shall be liable to a penalty of $\frac{10}{100}$ of a cent per yard, or to have the notice returned to him at the option of the party with whom the notice shall lodge at the close of the day. All transfers shall be made within exchange hours. The notice becoming a short notice with the close of the exchange on the day of its issue. All differences thereon to be paid as provided for in rule 30, paragraph 2, for payment of ring settlements.

Short notices. When sold as short notice the payments must be made direct and the price made equal to that at which it was first issued. Should the office of the party to whom notice is to be given be closed, it shall be good service to give the notice to the superintendent of the exchange. He shall endorse thereon the day and time of its receipt, and post notice thereof on the bulletin of the exchange.

All notices must be for 45,000 yards, in about 1,000 pieces of print cloths.

Transferable notice.

— o'clock, New York, —— —, 188–.

To C. & Co.:

Take notice that on —— we shall deliver you 45,000 yards, in about 1,000 pieces of print cloths, in accordance with the terms of our contract sale to you, dated —— at — cents per yard. We pledge ourselves to deliver warehouse order to the last holder of this notice upon presentation of the same to us between the hours of 11 a. m. and 12 m. o'clock of the —— being the day previous to that of delivery. The print cloths are to be received and held by the last acceptor hereof as custodian for us insured for whom it may concern, and subject to our order until we are paid at the rate of — cents per yard.

F. G. & CO.

227 Conditions.

In consideration of one (1) dollar paid to each of the acceptors, receipt of which is hereby acknowledged, it is agreed that the last acceptor hereof will, between the hours of 11 a. m. and 12 m. o'clock on the day preceding the — present the within notice to F. G. & Co., receive the warehouse order for the print cloths therein named, and on the following day receive the print cloths and hold the same as custodian and agent for the said F. G. & Co., insured for whom it may concern and subject to their order until they are paid the full amount of — cents per yard, and to settle with them on the basis of extra, 64 squares, with allowance for variation of grade in accordance with quotations of the New York Cotton Exchange existing on afternoon of fifth day previous to date of warehouse order. It is further agreed that each acceptor hereon shall continue his (or their) liability to each other for the fulfillment of the contracts until this notice shall have been returned to F. G. & Co., and a warehouse order specifying the print cloths to be delivered received by the last acceptor hereof from F. G. & Co., at which time all responsibilities of intermediate parties shall cease.

C. & CO.

Form of transfer.

— o'clock, New York, —— —, 188–.

Messrs. I. S. & Co.:

We accept the above with all its conditions and obligations, and you will please take notice that in accordance therewith we shall deliver you 45,000 yards, in about 1,000 pieces, print cloths on account of our contract sale to you, dated ——. The print cloths to be paid for at the price of transferable notice.

C. & CO.

If tendered by the drawer before exchange hours on the fifth day before delivery of print cloths is due, or if tendered by trans-

fer as short notice before 11 a. m. of the day before the de-
228 livery of print cloths is due, shall be accepted by any member of the exchange to whom print cloths are due under any contract, and the price shall be made equal to the price of the contract on which it shall be tendered, provided that it is otherwise in accordance with such contract; and the amount of print cloths delivered on such notice shall be accepted as so much received on account of the contracts specified in the notice and transfers. Any party holding such notice and failing to present the same to the drawer thereof before 12 m. of the day before the one specified therein for delivery of print cloths shall settle for such print cloths on the average price of that day for the like delivery with $\frac{1}{100}$c. per yard in favor of the seller; and each party issuing or transferring the same shall collect that amount from the party to whom they issued or transferred such notice in settlement, the contract to remain in full force.

Failure to present transfer order.

The superintendent of the exchange shall, when requested, give the price at which transferable notices shall be issued on the following day, and also furnish ring and margin prices.

Settlements.

Rule 34. When the settlement of a contract depends upon the market price on a particular day, the average quotations of the New York Cotton Exchange on that day for like deliveries, as declared by the official record of the superintendent of the exchange, is to be taken as the basis of settlement. In case of failure to deliver any portion of the print cloths named in the contract when due, no obstacle having been made by the buyer, the basis of settlement of print cloths due on such contract for default in delivery shall be $\frac{1}{100}$c. per yard above the average quotations for spot print cloths of the day of delivery. And if failure to receive any portion of the print cloths named in contract shall prove to be the fault of the buyer, the settlement shall be made at the average quotations for spot print cloths of the day following, with the addition of $\frac{1}{100}$c.
229 per yard in favor of seller. Provided, however, that no seller shall be entitled to receive penalty, unless he has given the stipulated notice of intention to deliver; and no buyer (who has not received notice), unless demand is made by him two days before expiration of the contract. Provided, also, that no defaulting party can claim settlement under this rule, except upon evidence that the default was unintentional and not premeditated. Nothing, however, in this rule shall be construed to prevent a settlement by mutual agreement.

Failure to deliver.

Failure to receive.

Notice must be given.

Any member who may find that he holds for account of his correspondents contracts, both of sale and purchase in same month which offset each other, shall be authorized to offset and settle such contracts and

Substitution.

to substitute therefor other names than those to, or from whom he originally sold or purchased; provided, that in such cases he shall be deemed guarantor to his principals for the strict fulfillment of such contracts, and shall be liable to them for all damage or loss they may sustain by reason of such substitution.

Quotations for sale reports.

Rule 35. The reported sales for each month, as made each day from the opening of the exchange until 3 p. m., shall be taken as the full day's report, and shall govern the superintendent in making the average quotations of that day for time contracts. When no sales for any month are reported at the exchange, the committee on future quotations shall fix the quotations for such month, if required.

Terms of deliveries on contracts.

Rule 36. On all contracts, two orders taken at the same time for delivery on the same day, making together 1,000 pieces from two places, shall be taken as a proper delivery if both such places be south of Fourteenth street in the city of New York, or in Brooklyn, not more than two miles apart; otherwise the entire contract must be delivered at one place. All orders from warehouse or other place of delivery, upon which five days' notice shall have been given, must be delivered to the first receiver before 12 m. of the day before the print cloths are due. And all contracts on which orders shall not be delivered in accordance with these stipulations, and all transferable notices (under rule 33), if presented, on which orders on warehouse or place of delivery shall not be delivered to the receiver, as stipulated above, shall be settled at the average quotation for spot print cloths of the day the print cloths are due, with the addition of $\frac{10}{100}$c. per yard against the defaulting party. Provided, that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional and not premeditated. Nothing, however, in this rule, shall be construed to prevent a settlement by mutual consent.

Quantity to be delivered on an order.

230

When no order is issued.

When no notice is given the delivery shall be made on the last day stipulated in the contract. The party so delivering shall present to the first receiver a transferable notice before 11 a. m. of the business day next before that of delivery. All transfers must be made as provided in rule 33, for regular 5-day transferable notice, and the party with whom it may lodge at the close of exchange hours of that day must present it to the drawer thereof before 4 p. m., and receive a warehouse order for the print cloths. Differences on the transferable notice to be paid as provided for in rule 30, for payment of differences on ring settlements and payments for the print cloths to be

When no notice is given.

Payment on transferable order.

secured as provided in rule 37, and variations in grade shall be in accordance with those existing on afternoon of fifth day previous to date of warehouse order.

Sales specified for delivery on same day may be delivered on orders not subject to above rule as to issue and transfer.

231 Time for payment for print cloths delivered on contracts.

Rule 37. The contract price of print cloths delivered on time contracts and the approximate value of any other print cloths delivered shall be payable on the day following delivery, provided the bill is presented before 12 m. of that day, except where payment on delivery is required, in which case the party delivering shall give notice of his intention to exact the same by an indorsement upon the warehouse order; and before tendering a delivery of the print cloths upon the contract he shall afford to the opposite party ample opportunity to examine and otherwise satisfy himself that the print cloths tendered are merchantable, and in all respects in full accordance with the said contract; this done, and the print cloths in position for immediate delivery, with a receipted bill in readiness, the delivery and payment shall be simultaneously made; or, if mutually agreed upon, an approximate amount may be deposited in a trust company as security—the certificate made payable to the order of either party, as the superintendent of the exchange may direct, who shall hold the same in trust, and upon the day following delivery shall indorse and pay over to the party delivering, or so much thereof as may cover the amount of his bill, provided the stipulations in reference to the presentation of bill, as contained in the first part of this rule, have been fulfilled. Print cloths shall be at the risk of the buyer after they have passed delivery, except where payment upon delivery is exacted, in which case no risk is to attach to the buyer until the delivery and payment is consummated.

Approximate amount may be deposited.

Nothing in this rule in reference to the liability of either buyer or seller shall be construed as preventing an agreement to the contrary, if the same is expressly agreed upon in writing.

232 Deliveries on contracts.

Rule 38. Print cloths to be deliverable on the contracts of this exchange must comply with the following, viz.: A 64 x 64 print cloth shall contain not less than 1,784 ends in the warp, and be 28 inches wide, 64 picks to the inch in the filling, and weigh not less than 7 yards to the pound. No piece of print cloth shall be less than 40 yards or longer than 50 yards; double cuts to be counted as two pieces. If more than on grade is packed in a bale, such bale shall not be considered merchantable, and may be rejected at the time of delivery, or if not discovered at the time of delivery claims for reclamation of same will be good for one year thereafter; but parties making such claims for reclamation must make affidavit before a

Reclamations.

commissioner or notary of such mixed packing and the date of discovery of same, and the settlement shall be made in accordance with similar grades on the day on which such discovery is made. Provided, always, that the party on whom such claims shall be made shall have the right to have said bale inspected by a licensed inspector, and shall also have the right, if he so desires, to appeal to the appeal committee on classification and value of print cloths.

Ruled 39. The day on which the print cloths are due the delivery shall not be required to commence before 8 a. m., nor to continue later than sunset.

Weather suitable for delivery.

Rule 40. If the weather be deemed unsuitable for the delivery of print cloths by any party interested in a delivery on any day, the superintendent of the exchange, at their request, shall obtain the opinion thereon of three members of the exchange (not interested in deliveries on that day), and if a majority decide that the weather be unsuitable for the delivery of print cloths, the superintendent shall post their certificate on the bulletin of the exchange,
233 dating the time of posting, which shall remain posted until a majority of said three members shall decide the weather to be suitable, when it shall be taken from the bulletin and filed, noting the time of removal. During the time such certificate is posted on the bulletin, all deliveries of print cloths may be suspended, at the option of either party to any delivery; and any delivery suspended under this rule shall be entitled to an extension of time—two hours more than the time such certificate was posted. The superintendent shall give a certified copy of said certificate to any member requiring it, on the receipt of 50 cents, and such copy shall be a sufficient authority for the suspension and resumption of delivery of any lot of print cloths by the parties to the delivery.

Measurement. Rule 41. In cases of dispute as to measurement, such dispute shall be referred to a regular sworn and licensed measurer, whose decision shall be final.

[Endorsed:] Bill of exceptions. Filed Apr. 30, 1889. J. W. Dimmick, clerk.

234 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the middle district of the State of Alabama, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Thomas H. Allen and Thomas H. Allen, Jr., who are each citizens of the State of Tennessee, and Richard H. Allen and Harry Allen, who are each citizens of the State of New York, and

all four of whom are partners doing business together as such under the firm name and style of Richard H. Allen & Company, and Benajah S. Bibb, who is a citizen of the State of Alabama, a manifest error hath happened, to the great damage of the said Benajah S. Bibb, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, dis-
235 tinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on Monday, the 14th day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done. .

Witness the Honorable Melville W. Fuller, Chief Justice
[L. S.] of said Supreme Court, the 26th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

Allowed by—
JOHN BRUCE, *Judge.*

Filed the 26th day of April, 1889.

J. W. DIMMICK, *Clerk.*

236 *Bond.*

Supreme Court of the United States.

BENAJAH S. BIBB, Plaintiff in Error,
vs.
THOMAS H. ALLEN, THOMAS H. ALLEN, JR., RICHARD H. ALLEN, & Harry Allen, Partners under the Name of Richard H. Allen & Company, Defendants in Error.

Know all men by these presents that we, Benajah S. Bibb, Wm. J. Bibb, & B. H. Craig, of the State of Alabama, are held and firmly bound unto Thomas H. Allen and Thomas H. Allen, Jr., of the State of Tennessee, and Richard H. Allen and Harry Allen, of the State of New York, partners under the name and style of Richard H. Allen & Company, in the sum of five hundred dollars, to be paid to the said Richard H. Allen & Company, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this the — day of March, 1889.

Whereas the above-named Benajah S. Bibb hath prosecuted a

writ of error to the Supreme Court of the United States
237 to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the said middle district of the State of Alabama:

Now, therefore, the condition of this obligation is such that if the above-named Benajah S. Bibb shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

B. S. BIBB. [L. S.]
W. J. BIBB. [L. S.]
B. H. CRAIG. [L. S.]

Sealed and delivered in the presence of—
E. W. PETTUS.

Bond approved this Ap'l 26, 1889.

JOHN BRUCE, *Judge.*

Filed the 26th day of April, 1889.

J. W. DIMMICK, *Clerk.*

Citation.

UNITED STATES OF AMERICA, *ss:*

To Thomas H. Allen, Thomas H. Allen, Jr., Richard H. Allen, and Harry Allen, partners under the firm name and style of Richard H. Allen & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Wash-
238 ington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of the State of Alabama, wherein Benajah S. Bibb is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 26th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL.] JOHN BRUCE, *Judge.*

Rec'd in office Ap'l 27, '89.

WM. W. ALLEN,
U. S. Marshal.

On this 27th day of April, in the year one thousand eight hundred and eighty-nine, personally appeared before me, Benj. P. Seals, deputy clerk of the circuit court of the United States for the middle dist. of Alabama, Robert H. Sommerville, deputy United States marshal for the middle district of Alabama, and makes oath that he delivered a true copy of the within citation to A. A. Wiley, Esq.,

a member of the firm of Rice & Wiley, attorneys of record for the plaintiffs, Richard H. Allen & Co.

R. H. SOMMERVILLE,
Dep. U. S. M.

Sworn to and subscribed before me this 27th day of April, 1889.

BENJ. P. SEALS,
Dep. Clerk U. S. Cir. Court, Mid. Dist. of Alabama.

Filed April 27, 1889.

J. W. DIMMICK, *Clerk.*

239 UNITED STATES OF AMERICA, *Middle District of Alabama,* } *ss:*

I, J. W. Dimmick, clerk of the circuit court of the United States for the said middle district of Alabama, hereby certify that the foregoing pages numbered from one to 238, both inclusive, contain a full, true, and complete transcript of the record and proceedings had in a case lately depending in said court, wherein Richard H. Allen & Co. were plaintiffs and B. S. Bibb & Co. defendants, as fully and completely as the same appear of record and on file in my office as such clerk.

Seal of the United States Circuit Court, Middle District of Alabama.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this 26th day of Sept., A. D. 1889.

J. W. DIMMICK,
Clerk U. S. Cir. Court Mid. Dist. of Alabama.

Endorsed on cover: Case No. 13,888. M. Alabama C. C. U. S. No. 607. Benajah S. Bibb, plaintiff in error, *vs.* Thomas H. Allen, Thomas H. Allen, Jr., Richard H. Allen, and Harry Allen, partners under the firm name and style of Richard H. Allen & Company. Filed October 28, 1889.

CASE No. 13,888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 269.

B. S. BIBB, PLAINTIFF IN ERROR,

vs.

THOMAS H. ALLEN ET AL.

WRIT OF CERTIORARI AND RETURN.

FILED MARCH 28, 1893.

THE UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States to the judges of the circuit court of the United States for the middle district of Alabama, Greeting:

Whereas in a certain suit in said circuit court between Thomas H. Allen, Thomas H. Allen, Jr., Richard H. Allen, and Harry Allen, partners doing business under the firm name and style of Richard H. Allen and Company, plaintiffs, and Benajah S. Bibb, defendant, which suit was removed to the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

That the commission of George H. Carey to take the deposition of Richard H. Allen is omitted from the said transcript:

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of March, A. D. 1893.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Supreme Court of the United States, October Term, 1892.

B. S. BIBB, Plaintiff in Error, *vs.* THOMAS H. ALLEN *et al.* } No. 269.

On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari herein—

It is now here ordered by the court that the writ of certiorari be, and the same is hereby, awarded, returnable forthwith, and leave is granted to file the record presented as a return thereto.

March 27, 1893.

Commission to Take Deposition.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

To George H. Carey, Esq., No. 60 Wall street, New York city:

Know ye that we, having full faith in your prudence and competency, have appointed you commissioners and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine Richard H. Allen, who resides in the State of New York and whose office & place of business is at 31 & 33 Broad street, in the city of New York, as witness in behalf of plaintiffs in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein Richard H. Allen & Co. are plaintiffs and B. S. Bibb & Company defendants, on oath to be by you administered, upon interrogatories & cross-interrogatories annexed to this commission, to take and certify the deposition of the witness and return the same to our said circuit court with all convenient speed under your hands and seals.

Seal of the United States Circuit Court, Middle District of Alabama.

Witness Hon. Sam'l F. Miller, Chief Justice of the Supreme Court of the United States, this 18th day of April, A. D. one thousand eight hundred and eighty-eight.

Issued the 18th day of April, 1888.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

Directions.

1. If the time and place of executing the commission are not named therein the commissioners will subpœna the witnesses to appear before them at such time and place as they may appoint and administer the oath to witnesses.

2. Either the commissioner, witness, or some impartial person must reduce the answers of witnesses to writing, as near as may be, in the language of the witness.

3. The heading or title of the depositions should be in this form:

"Deposition of A B, witness, sworn (or affirmed) and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama in a certain cause therein depending between C D, plaintiff, and E F, defendant. A B, of ——, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

"1st. To the first interrogatory he saith:

"2d. To the second interrogatory he saith:

"1st. To the first cross-interrogatory he saith:"

When the deposition is finished it must be subscribed by the witness—

(Witness' name) A—— B——,

and certified as follows: "We, the commissioners (if all act, or I, if one of the commissioners, as the case may be) in said commission named, do hereby certify that the evidence of the witness A B was taken down under oath and subscribed by him in our presence on the — day of ——, 187–, at ——, in the county of ——, State of ——, and that we have personal knowledge of said witness or (if unacquainted with the witness) that proof has been made before us of the personal identity of said witness, and that we are (or I am) not of counsel in the cause or of kin to any of the parties in interest or in any manner interested in the result thereof.

"Witness our hands and seals (or my hand and seal).

"G—— H——, [SEAL.]
"L—— K——, [SEAL.]
"*Commissioners.*"

4. The commissioners will fold the commission, interrogatories, answers, and any document deposed to by the witness in a packet, sealed. They will write their names across the seals and direct it thus:

C D
vs.
E F.
Deposition of
A B,
Witness for the plaintiff
(or defendant).

To J. W. DIMMICK, Esq.,
Clerk of the Circuit Court of the United States, Middle District of Alabama,
Montgomery, Ala.

The package may be sent by mail or private conveyance. If sent by mail, on back take receipt of P. M., thus: "Received this package of G H, commissioner, to be forwarded by due course of mail.
Date. E. G., *Postmaster.*"

UNITED STATES OF AMERICA,
Middle District of Alabama, } *ss:*

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, in the fifth judicial circuit, hereby certify that the foregoing pages, numbered 1 and 2, contain a full, true, and correct copy of the commission to take the deposi-

tion of Richard H. Allen in the case of Richard H. Allen & Company against B. S. Bibb & Company, lately pending in said court and which was appealed to the Supreme Court of the United States, as the same remains on file in my office as such clerk.

Seal of the United States Circuit Court, Middle District of Alabama.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this the 27th day of January, A. D. 1892.

J. W. DIMMICK,
Clerk United States Circuit Court for the Middle District of Alabama.

In the Supreme Court of the United States.

B. S. BIBB
vs.
RICHARD H. ALLEN & Co.

Personally comes before me, A. Kayser, a notary public in and for Dallas county, in the State of Alabama, George H. Craig, who is to me personally known, and who, being duly sworn by me, deposes and says that he was one of the attorneys in the case of Richard H. Allen & Co. against B. S. Bibb & Co., in the circuit court of the United States for the middle district of Alabama, for the defendants, and that he is now attorney for the plaintiff in error in the above-stated case; that he has personally examined the original commission, which was issued in the said circuit court, to take the deposition of Richard H. Allen as witness for the plaintiff; that said commission was issued to George H. Carey, Esq., and not to George H. Corey, Esq.; that the copy of the said commission on the foregoing transcript on page 1 thereof is substantially a true copy of said original.

GEORGE H. CRAIG.

Sworn to and subscribed by said George H. Craig before me on this the 3d day of October, 1892, at my office, in Selma, Dallas county, Alabama, as witness my hand and official seal.

[Seal A. Kayser, Notary Public, Dallas County, Ala.]

A. KAYSER,
N. P., Dallas Co., Ala.

[Endorsed:] No. 269. Supreme Court of the United States, Oct. term, 1892. B. S. Bibb, plaintiff in error, *vs.* Richard H. Allen & Co. Extract of record and affidavit in support of motion for certiorari. C. C. Lancaster, counsel for pl'ff in error.

[Endorsed:] Case No. 13,888. Supreme Court U. S., October term, 1892. Term No., 269. B. S. Bibb, pl'ff in error, *vs.* Thomas H. Allen *et al.* Writ of certiorari. Order awarding same and return thereto. Filed Mar. 28, 1893.

149 U.S. 441
269

Office Supreme Court U. S.
FILED.
OCT 18 1892
JAMES H. McKENNEY,
CLERK

RECORD No. 13,888.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

BENAJAH S. BIBB, Plaintiff in Error,

vs.

RICHARD H. ALLEN & CO.

From the Circuit Court of the United States for the Middle District of Alabama, by Writ of Error.

BRIEF FOR PLAINTIFF IN ERROR,

BY

GEO. H. CRAIG, ESQ.,
AND
PETTUS & PETTUS, Attorneys.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

RECORD CASE 13,888.

BENAJAH S. BIBB, Plaintiff in Error,

vs.

THOMAS H. ALLEN, THOMAS H. ALLEN, JR., RICHARD H. ALLEN AND HARRY ALLEN, PARTNERS UNDER THE FIRM NAME AND STYLE OF RICHARD H. ALLEN & CO., Defendants.

From the Circuit Court of the United States for the Middle District of Alabama, by Writ of Error.

STATEMENT OF THE CASE.

PLEADINGS.

This was an action of assumpsit brought by Richard H. Allen & Company, against Benajah S. Bibb and Thomas H. Hopkins, as partners under the firm name of B. S. Bibb & Co. The complaint is in the Alabama Code Form, with only one count, for the sum of $20,023.50 for work and labor, and money paid out and expended by the plaintiffs, at the special instance and request of the defendants. Record, p. 1.

The defendants plead separately; Hopkins for himself plead first, non-assumpsit; and second, that the

plaintiff did not do the work and labor, or pay the money mentioned in the complaint, at his instance or request. Record, pages 4 and 5,

The defendant Bibb plead first, non-assumpsit.

Second, that the plaintiffs did not do the work, nor pay the money mentioned in the complaint, at his instance or request.

Third, a general denial of the allegations of the complaint.

Fourth, sets out the statute of New York against wagers and bets, and avers that the work and labor mentioned in the complaint was the making of eleven wagers by the plaintiffs, for B. S. Bibb & Co., and that the money paid, mentioned in the complaint, was the payment of the money lost on these wagers. Bibb's fifth plea was like the fourth, setting out the New York Statute, and averring that the work and labor was the making of eleven wagers on the price of the cotton, and the money paid, was the money paid by the plaintiffs in the settlement of the eleven wagers. Record, pages 2, 3 and 4.

The plaintiffs took issue on all these pleas before mentioned. Record, pages 4 and 5. Afterwards, by leave of the Court, the defendant, Bibb, filed his sixth plea. Record, pages 6 and 7. This sixth plea is, in substance, a plea stating the sale of 10,000 bales of cotton by the plaintiffs for the defendant Bibb, in New York, as a speculation, and for future delivery. That in making the contracts, the plaintiffs by their gross negligence and unskillfulness, made said contracts in such forms, that they were unlawful and void under the Statute of Frauds of New York, and the Statute of Frauds of New York is set out; after which the defendant in the said plea avers that no note or other memorandum of said contracts was made in writing and subscribed by the parties to be charged thereby; no part of the cotton was accepted by the seller; the buyer paid no part of the purchase money; and that the plaintiffs, not at the request of

Bibb, but voluntarily, settled said void contracts; and, without the request of this defendant, paid the loss, and the plea concludes with the averment that without this, the plaintiffs never did any work, nor paid any money for the defendant.

The plaintiffs demurred to this sixth plea. Record, pages 5 and 6. But the record shows no action of the Court on this demurrer.

TRIAL AND THE INCIDENTS THEREOF.

When the cause was called for trial January 10th, 1889, the plaintiffs were ready for trial, but Hopkins made an application for a continuance, but this application was over-ruled, and thereupon the defendants severally and separately made a motion, in writing, to suppress the deposition of Richard H. Allen, taken by George H. Corey, for the plaintiffs. Motion is on record pages 7 and 8.

The court then tried this motion and over-ruled it, and the defendant Bibb then and there excepted. Record 10 and 11.

The said deposition of R. H. Allen, and all the papers connected therewith are copied into the record as 'Exhibit 2, to the Bill of Exceptions," commencing on page 26 of the record and extending to page 46 of the record.

This deposition was not taken under and in accordance with the statutes of the United States, but the attempt was made to take this deposition under the statutes of the State of Alabama.

Interrogatories were filed by the plaintiffs to said R. H. Allen, record page 26, of which notice was given to the defendant Bibb, and the defendant Bibb filed objections to the taking of said deposition. (See objections on page 33 of the record.)

A commission was issued by the Clerk of the Court to George H. Carey of New York, as commissioner to

take the deposition; record 34, but the deposition was, in fact, taken by George H. Corey, as commissioner. Record 46.

The case was then tried and a bill of exceptions was signed and sealed by the Judge presiding, on the 30th day of April 1889, under the agreement of counsel, and many exceptions were taken by the plaintiff in error, Bibb—in the course of the trial to the rulings on the evidence and to the charges given by the Court.

On the trial the plaintiff offered in evidence, separately, four Acts of the Legislature of New York incorporating and amending the Act incorporating the New York Cotton Exchange, and to each of these Acts, separately, Bibb, one of the defendants, objected, but his objections were overruled and the defendant Bibb excepted. Pages 12 and 13 of the record.

The plaintiff also read in evidence, without objection, sixteen letters written by Richard H. Allen & Company of New York, and addressed to B. S. Bibb & Co., at Selma, Alabama, and also four letters written by B. S. Bibb & Co., at Selma, Alabama, and addressed to Richard H. Allen & Co., of New York. These letters are copied in full in the Bill of Exceptions as Exhibit No. 4 and Exhibit No. 5.

Exhibit No. 4 commences on page 47 and ends on page 56; Exhibit No. 5 commences on page 56 and ends on page 58.

The plaintiff also read a telegraphic correspondence between the plaintiffs and B. S. Bibb & Co., which is set out in the record as Exhibits 6 and 7 to the Bill of Exceptions, which commence on page 58 and end on page 66 of the record. This correspondence by telegram and by letters shows that R. H. Allen & Co., applied to B. S. Bibb, doing business under the name of B. S. Bibb & Co., for their business in cotton futures, and during the month of November 1886, R. H. Allen & Co., sold in various lots ten thousand bales of cotton for B. S. Bibb

& Co., that the cotton advanced in price and there was a heavy loss; that Allen & Co., repeatedly called for margins, but did not get remittances; that finally on the 30th day of December, 1886, without instructions from Bibb & Co., Allen & Co., bought to cover ail the losses of contracts of sale, and the loss on the cotton, with the commissions added, amounted to $20,023.50, that plaintiffs claimed to have paid these losses, but there was no proof of any expressed request on the part of Bibb that plaintiff should pay these losses.

There was evidence tending to show that Thomas H. Hopkins, the defendant was a partner of B. S. Bibb, under the firm name of B. S. Bibb & Co. See testimony of witness Haslip, record page 11, and also of Jesse Beale, on page 13 of the record.

And there was also testimony, tending to show that Thomas H. Hopkins, the defendant, was not the partner of B. S. Bibb, nor in any way interested in the business of B. S. Bibb & Co., but was merely the clerk of B. S. Bibb, doing business under the name of B. S. Bibb & Co. See testimony of witnesses Lacy, Armstrong and Hopkins, on page 21 of the Record, and also testimony of B. S. Bibb, on page 22 of the Record.

One of the plaintiffs, Harry Allen, was examined orally, as a witness for the plaintiffs; his testimony commences on page 13 of the Record. He testified that he was a members of the New York Cotton Exchange, and contracted for the business of his firm in that Exchange, when he was in New York, and when he was not in New York the business of his firm was contracted in the Exchange by a broker; but that contracts made by the broker were signed by another member oi the firm; that he was now a member of the Exchange

Counsel for the plaintiffs then handed to the wit ness and asked him to examine the "slip contracts," nineteen in number, which were attached to the deposi tion of Richard H. Allen, and appear on pages 36, 37 and

38 of the record, and marked respectively "Exhibits A" and also marked from 1 to 19 inclusive, with the name of "George H. Corey, Commissioner." The said witness examined said nineteen "slip contracts." Thereupon the plaintiff's counsel asked the witness, Harry Allen, whether that form of "slip contract" was, or was not, according to the then prevailing course of business in the New York Cotton Exchange? To this question the defendant, Bibb, made objection, but the Court overruled Bibb's objection to the question, and Bibb excepted, and the witness answered that each of said "slip contracts" was made and signed and delivered in accordance with the then prevailing course of business in the New York Cotton Exchange. See Record, page 14.

Counsel for the plaintiffs then asked said witness, Harry Allen, to read said nineteen "slip contracts" to the jury, and thereupon the defendant, Bibb, objected, separately, to the reading of each of said "slip contracts," and stated the grounds of his objection, and proposed to read the Statute of Frauds of New York, in support of his objection, but the Court refused to permit the reading of said Statute of Frauds, and the defendant Bibb excepted to the Court's said refusal: and thereupon the Court overruled the objection of the said Bibb to the reading of the said nineteen "slip contracts" as evidence, and the defendant Bibb, excepted, separately to the rulings of the Court, on his objection to each of said contracts; and thereupon the said witness, Harry Allen, read all of said nineteen "slip contracts" to the jury. Page 15 of the Record.

Thereupon the attorney for the plaintiffs asked said witness, Harry Allen, this question: "By whom was the cotton mentioned in the said 'slip contracts' sold?" And to this question the defendant, Bibb, objected and stated the grounds of his objection, but the Court overruled the objection of the defendant, Bibb, and thereupon the defendant Bibb, excepted, and the witness, Harry

Allen, answered said question in these words: "Richard H. Allen & Co., by me, sold said cotton mentioned in said 'slip contracts.' Page 15 of Record.

The attorney for the plaintiffs then asked said Harry Allen this question: "When these 'slip contracts,' read in evidence were delivered, did your firm deliver to the buyers a corresponding 'slip contract?'" And to this question the defendant, Bibb, objected, and stated the ground of his objection, but the Court overruled said objection, and the defendant, Bibb, excepted, and the witness answered said question in these words: 'When said 'slip contracts' read in evidence were delivered to me, I delivered to each buyer, respectively, a corresponding 'slip contract.'" And thereupon the plaintiff's attorney asked Harry Allen this question: "Was, or not, the exchange of 'slip contracts' in the form of the nineteen 'slip contracts' read in evidence, according to the course of business then prevailing in the New York Cotton Exchange?'" And to this question the defendant, Bibb, objected, and stated the grounds of his objection, but the Court overruled the said objection, and the defendant, Bibb, excepted, and the said witness answered the said question in these words: "The exchange of 'slip contracts' in the form of the nineteen 'slip contracts' read in evidence, was according to the course of business then prevailing in the New York Cotton Exchange." Pages 15 and 16 of the Record.

The plaintiffs then offered in evidence all of a printed book, after page 10, which book was entitled "Charter, By-Laws and Rules of the New York Cotton Exchange." And thereupon the defendant Bibb objected to the reading of said book, after page 10, and stated his grounds of objection, but the court overruled said objection, and the defendant, Bibb, excepted, and all of said book, after page 10, was read in evidence. That part of said book from the beginning to page 10 inclusive, contained merely the Acts of the Legislature of the

State of New York, which had been read in evidence before, and the entire book is set out as an exhibit to the bill of exceptions as Exhibit No. 3 to the Bill of Exception. Certain parts of another book called "Shepperson's Code" were then read in evidence, without objection by the plaintiffs. Said witness, Harry Allen, also testified that he went to Selma the latter part of December 1886, to see Bibb & Co., about margins, and saw Bibb, the defendant, and asked for margins, but got none and stated what occurred between himself and said Bibb, on that occasion, and that said Bibb denied all liability, and Bibb refused to give any instructions about contracts made by the plaintiffs for him, and that he informed Bibb that he intended to send a telegraphic message to his firm in New York, advising them to cover all sales made for B. S. Bibb & Co., and fix the losses; and that he left Selma that night for Memphis, after sending said telegram. And said Harry Allen further testified that the contracts made by R. H. Allen & Co., for B. S. Bibb & Co., were closed on the 30th day of December 1886, by buying to cover, and that the losses on these contracts amounted in the aggregate to $19,273.50, and were paid by R. H. Allen & Co., on the 30th day of December, 1886, that the commissions on the sales made for B. S. Bibb & Co., were $750.00, according to the contract price.

Said Harry Allen then examined the eight "slip contracts" attached to the deposition of Richard H. Allen, in this case, and dated December 30th, 1886. Each of said eight slip contracts is marked on the back thereof, "Exhibit B., George H. Corey, Commissioner," and each of said eight slip contracts are respectively marked on the back, after the letter "B," from 1 to 8 inclusive. See copies of said eight contracts on pages 38 and 39 of the record. The said Harry Allen testified that the said eight slip contracts were the contracts made by Richard H. Allen, for the firm of Richard

H. Allen & Co., and in their name to cover the contracts of sale.

Thereupon the plaintiff's attorney asked the said Harry Allen this question: "Was, or not, said eight slip contracts, according to the course of business then prevailing in the New York Cotton Exchange?" and to this question the defendant Bibb objected, and stated the grounds of his objections, but the Court overruled the objection of the defendant Bibb, and the said Bibb excepted, and the said witness answered as follows: "The said eight slip contracts were according to the then prevailing course of business in the New York Cotton Exchange, and the said eight slip contracts were then read in evidence. Page 18 of the record.

On the cross-examination by the defendant, said Harry Allen testified in substance as follows: "I was in Memphis, or on the road from Selma to Memphis on the 30th day of December 1886, when the contracts for the sale of cotton made by R. H. Allen & Co., for B. S. Bibb & Co., were closed out by contracts to cover, but I do know said contracts were closed on December 30th 1886, by contracts to cover. I was not in New York when R. H. Allen & Co., paid the $19,273.50 for B. S. Bibb & Co., but I know that R. H. Allen & Co., did pay that amount for B. S. Bibb & Co., in New York on the 30th day of December 1886. It was paid by Richard H. Allen, for our firm, for he was the only member of the firm then in New York. I do not know in what it was paid, whether in checks or money. I cannot say to whom or in what amounts. It was paid to different persons or firms, but I know it was paid. There is no difference between the form of the contract, which is a purchase to cover a sale and the form of a contract of purchase which is purchased for speculation. When the contracts were made in New York in November 1886, by Allen & Co., for B. S. Bibb & Co., there was in each one of the nineteen slip contracts (attached to the deposition of R. H. Allen)

opposite to and following the word "buyer" the name of the buyer, but the words around or by the words "seller," on each of the nineteen slip contracts were written there by me afterwards—not as a part of the contract, but as a memorandum from which the book-keeper of R. H. Allen & Co., could make proper entries on the books. So far as I know, B. S. Bibb & Co., were not informed as to the forms of the contracts of sale made for them by Richard H. Allen & Co., until after this suit was commenced. I did testify on a former trial of this case that I did not know of my personal knowledge who paid the losses of the contracts of sale made for B. S. Bibb & Co., but I investigated the matter, and I am sure that these losses were paid by R. H. Allen & Co. Thereupon the defendant, Bibb, objected to and moved to exclude that part of said answer which is in these words: "I am sure that these losses were paid by R. H. Allen & Co.," but the Court overruled this motion to exclude, and the defendant, Bibb, then excepted to this ruling. Page 19 of the record.

Said Harry Allen further testified on the cross examination that when the plaintiffs sold the cotton for B. S. Bibb & Co., in November, 1886, no part of the cotton was delivered, nor was any part of the purchase money paid. Page 19.

The witness, Harry Allen, on the rebuttal examination, testified in substance, that he had never heard of any objection being made by B. S. Bibb & Co. to the account rendered by Allen & Co.; and that in making the sales of cotton for Bibb & Co., in November, there was no agreement or understanding, expressed or otherwise, that the cotton should not be delivered, or to that effect. The plaintiff's attorney then asked said witness this question: "Will you state whether, or not, the books of R H. Allen & Co. show the closing of said contracts" And to this question Bibb objected, and stated the grounds of his objection. But the Court overruled this objection,

and Bibb then and there excepted; and the said witness answered that the books of R. H. Allen & Co. did show the closing of said contracts; and the said witness further testified that he could not have continued a member of the New York Cotton Exchange if the losses on the contracts of sale, made by Allen & Co., for Bibb & Co., had not been paid; that no one, except he be a member of the New York Cotton Exchange, can make a contract in that Exchange, or be a party to a contract there made, except in this way: A firm, with one of the members of the Exchange for a partner, can sign contracts made for the firm by some other member of the Exchange. That witness returned to New York about the 9th or 10th of January, 1887; contracts of sale made for B. S. Bibb & Co. by Allen & Co. were not outstanding, if they had been so, I would have known it. Record, pages 19 and 20.

The plaintiffs then proposed to read, as evidence, the deposition of R. H. Allen, taken by Geo. H. Corey. Thereupon defendant Bibb objected to the reading of said deposition, and stated the grounds of his objection, and on said objection of the defendant Bibb, to the reading of the deposition of the said R. H. Allen, the same evidence was given to the Court as was given for the plaintiffs and the defendants on the trial of the motion of the defendant to suppress the said deposition of R. H. Allen. But the Court overruled the objection of said Bibb, to the reading of said deposition, and to this ruling said Bibb then excepted, and the said deposition was read as evidence for the plaintiffs. Page 20.

The defendant Hopkins then introduced his evidence. Pages 21 and 22.

The said defendant Bibb, and the said defendant Hopkins, both testified, in substance, that Hopkins never was a partner of B. S. Bibb, but that B. S. Bibb did business for himself alone, under the name of B. S. Bibb & Co.; and said B. S. Bibb testified that in his interview

with Harry Allen, at Selma, he refused to give him any instructions, and told him that he was not liable on account of the contracts made on orders of B. S. Bibb & Co. The defendant Bibb read as evidence for himself the the Statute of New York on the subject of bets and wagers, and also the Statute of Frauds of New York, both of which are copied into the transcript on page 23.

After argument by counsel the Court charged the jury as follows: "This case is made out as to the defendant Bibb, and it is your duty to find a verdict against him for the account sued on, and interest." To this charge the defendant Bibb then and there excepted, in open court, and in presence of the jury and before the jury retired, and afterwards the jury returned a verdict in the words following: "We, the jury, find for the plaintiffs, against the defendant Bibb, and assess the damages at $22,476.38; and we find for the defendant T. H. Hopkins, on the ground that we find he was not a partner of B. S. Bibb."

Thereupon the defendant Bibb objected to a judgment being rendered against him on the verdict returned by the jury for the damages assessed, because the complaint and pleading and said verdict did not authorize a judgment against the defendant Bibb. But the Court overruled said objection, and the defendant Bibb then and there excepted to this ruling of the Court. Page 24.

And the presiding Judge afterwards signed and sealed the bill of exceptions as of the term of said Court at which said trial was had.

ASSIGNMENT OF ERRORS.

And the plaintiff in error, Benajah S. Bibb, by his counsel, says: There is manifest error in the record and proceedings of the Circuit Court of the United States for

the Middle District of Alabama, in this case—in these to wit:

First—The said Circuit Court erred in overruling the motion of the defendant Bibb to suppress the deposition of Richard H. Allen. Record, pages 10 and 11.

Second—And the said Circuit Court erred in overruling the objections of the plaintiff in error to the reading of "An Act Incorporating the New York Cotton Exchange" passed April 8th, 1871, as evidence. Page 12.

Third—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the reading of chapter 228 of the "Pamphlet Acts of New York" for the year 1880, as evidence to the jury. Page 12.

Fourth—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the reading of chapter 113 of the "Pamphlet Acts of New York" for the year of 1881, as evidence. Page 12.

Fifth—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the reading of the amendment to the Charter of the New York Cotton Exchange, passed by the Legislature of the State of New York in 1883 as evidence. Page 12.

Sixth—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the question asked said witness, Harry Allen: "Whether that form of slipt contracts was, or was not, according to the then prevailing course of business in the New York Cotton Exchange." Page 14.

Seventh—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the reading of the nineteen "slip contracts," attached to the deposition of Richard H. Allen, as evidence to the jury. Page 14.

Eighth—And the said Circuit Court erred in refusing to allow the plaintiff in error to read the Statute of Frauds of New York. Page 14.

Ninth—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the question asked the said witness, Harry Allen, which is as follows: "By whom was the said cotton mentioned in said slip contracts sold?" Page 15.

Tenth—And the said Circuit Court erred in overruling the objection of the plaintiff in error, to the question propounded to the witness, Harry Allen, which is as follows: "When these slip contracts read in evidence were delivered, did your firm deliver to the buyers a corresponding contract of sale?" Page 15.

Eleventh—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the question propounded to the witness, Harry Allen, which is as follows: "Was, or was not, the exchange of slip contracts in the form of the nineteen slip contracts read in evidence, according to the course of business then prevailing in the New York Cotton Exchange?" Pages 15 and 16.

Twelfth—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the reading from the printed book, the charter, by-laws and rules of the New York Cotton Exchange, all after page 10, to the end on page 124 of said book as evidence. Page 16.

Thirteenth—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the question propounded to the witness Harry Allen, which is as follows: "Was, or not, said eight slip contracts according to the then prevailing course of business in the New York Cotton Exchange?" Page 18.

Fourteenth.—And the said Circuit Court erred in overruling the motion of the plaintiff in error to exclude that part of the answer of the witness Harry Allen, which is as follows: "I am sure that these losses were paid by R. H. Allen & Co." Page 19.

Fifteenth.—And the said Circuit Court erred in overruling the objection of the plaintiff in error to the question

propounded to the witness, Harry Allen, which is as follows: "Will you state whether, or not, the books of R. H. Allen & Co. show the closing of said contracts?" Page 20.

Sixteenth.—And the said Circuit Court erred in permitting the plaintiffs to read in evidence the deposition of Richard H. Allen against the objection of the plaintiff in error. Page 20.

Seventeeth.—And the said Circuit Court erred in charging the jury as follows: "This case is made out as to the defendant Bibb, and it is your duty to find a verdict against him for the account sued on, and interest.' Page 24.

Eighteenth.—And the said Circuit Court erred in overruling the objection of the plaintiff in error, to a judgment being rendered against him, on the verdict returned by the jury, for the damages assessed. Page 24.

Nineteenth.—And the said Circuit Court erred in rendering a judgment against the plaintiff in error on the verdict of the jury. Page 24.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

1. The Deposition of Richard H. Allen ought to have been suppressed. Record, page 10. The Statute Laws of the United States provide a complete system for taking depositions in the trial of Causes at Common Law, and this system is so complete that it leaves no room for the practice of any other system provided for in the State statutes. In ex parte Fisk, 113 U. S Reports, on page 724, this Court commenting on the Statute of the United States which provides for the taking of testimony in common law actions, says: "On the contrary, its purpose is clear to provide a mode of proof in trials at law to the exclusion of all other modes of proof; and because the rigidity of the rule may, in some cases, work a hardship, it makes exceptions to such cases as it recognizes to be entitled to another rule, and it provides that

rule for those cases. Under one or the other all cases must come. Every action at law in a court of the United States must be governed by the rule, or by the exceptions which the statute provides. There is no place for exceptions made by State statutes. The court is not at liberty to adopt them, or to require a party to conform to them."

Section 863 of the Revised Statutes of the United States provide in what causes witnesses may be examined by deposition, and what officers may take such deposition, and declares: "Reasonable notice must first be given, in writing, by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness, and the time and place of taking his deposition."

No notice was ever given to Bibb, or his attorney, of the time or place of the taking of the deposition of Richard H. Allen.

This deposition was not taken by any one of the officers, authorized by the law, to take such deposition. These officers are named in section 863.

The attempt was made to take this deposition according to the statutes of the State of Alabama, and for this purpose interrogatories were filed by the plaintiff to the witness. Page 26. And an affidavit was made. Page 31. And notice was issued to the defendants, by the firm name, of the filing of these interrogatories. Record, page 32. And this notice was served on B. S. Bibb. Record, page 32. This notice states merely that Richard H. Allen resides in the State of New York, and that his office is at certain numbers in the city of New York, and that George H. Corey resides in New York and that his office is at a certain number in the city of New York.

In less than ten days after the service of the notice Bibb filed objections to a commissioner being appointed

to take the deposition of R. H. Allen, on the interrogatories filed by the plaintiff. Record, page 33. At the same time "without waiving the foregoing objections or either of them," Bibb filed cross interrogatories to the witness. Record, pages 33 and 34.

The commission to take the deposition was issued to George H. Carey and not to George H. Corey.

The Statutes of Alabama provides, on this subject, as follows: "The party, after making affidavit, may file with the clerk interrogatories to be propounded to the witness, of which, and of the residence of the witness, and of the commissioner to be appointed, he must give the opposite party, or his attorney, notice in writing."

"On failure to give the notice herein required of the residence of the witness and the commissioner, unless the same is waived by the adverse party, the deposition of such witness must be suppressed at the cost of the party taking it." Code of Alabama, Section 2,803.

As the bill of exception shows the motion to suppress the deposition of Richard H. Allen was made "before the trial commenced," and was tried before the trial commenced. Record, 10 and 11. This motion to suppress the deposition is "Exhibit 1, to Bill of Exception," in record, page 25. So it will be seen that the deposition was not taken legally, either according to the Statutes of the United States or the Statutes of the State of Alabama. The Alabama Statutes provides that: "All objections to the admissibility to the entire evidence must be made before entering on the trial, and not afterwards * * *." Section 2,809 of the Code of Alabama of 1886.

The proposition that Bibb had waived his objection to the taking of this deposition is not true; he objected at the beginning, when first informed of the filing of the interrogatories. It is true that the deposition was "Published under general order of the court, entered on May 29th, 1888." Page 10 of the record. But this order was

not made in this particular case, and there is no sort of evidence tending to show that Bibb, or his counsel, had any notice that the deposition had been taken until the motion was made. Under the practice of Alabama, in the law courts, there is a *general order* to publish testimony, and this practice was followed in this case, but there is nothing to show *at what time* the deposition was published, or when it was received in the clerk's office.

Second—It is insisted that the Act to incorporate the New York Cotton Exchange, and the Acts amending the charter of the New York Cotton Exchange, read in evidence for the plaintiff, were irrelevant. Record, page 12.

It is entirely immaterial to any question in this case whether the New York Cotton Exchange was, or was not incorporated. A voluntary association, not incorporated can make rules and regulations for the transaction of their business, provided such rules and regulations do not conflict with the law, and if incorporated, it is not pretended that any rules of the New York Cotton Exchange in conflict with the law of the State could be valid or binding on any one.

Third—Harry Allen, one of the parties, and as witness for the plaintiffs, was allowed to testify against the objections of Bibb, as follows: "Each of said 'slip contracts' was made and signed and delivered in accordance with the then prevailing course of business in the New York Cotton Exchange." Record, page 14. And as follows: "The exchange of 'slip contracts,' in the form of the nineteen 'slip contracts' read in evidence, was according to the course of business then prevailing in the New York Cotton Exchange." Record, page 16. And as follows: "The said eight 'slip contracts' were according to the then prevailing course of business in the New York Cotton Exchange."

These three matters are seperately assigned as error, but they involve the same question. The attempt was

to prove a custom, or course of business, of merely a temporary character. We admit that custom, not contrary to law, may be proved, but such custom to be valid must be "ancient, reasonable, generally known and certain."—United States vs. Buchanan, 8 Howard, 83.

The custom or course of business cannot change the law, or make a contract valid, which the statute declares void.

Fourth—The nineteen "slip contracts" read in evidence, under the Statute Law of the State of New York, were void. These nineteen contracts are copied, separately, on pages 36, 37 and 38. Take the first, and they are all like it, and it is in these words:

"NEW YORK, Nov. 10, 1886.

Seller,
Buyer, Zerega & White.
On contract, subject to rules and regulations of New York Cotton Exchange.
Twenty-five hundred bales cotton.
Jan. 1 delivery.
Price, 8.99.
X per Z. & White, seventy-five."

The foregoing is all of the contract as to this twenty-five hundred bales, which was in writing, excepting that illegally proved by parol. The words before the word "seller," except "New York, Nov. 10, 1886," were not in the contract when made, but were put there afterwards by Harry Allen, as a memorandum for his book-keeper.

Harry Allen testified as follows, "When the contracts were made in November, 1886, by Allen & Co., for B. S. Bibb & Co, there was in each one of the nineteen 'slip contracts' (attached to the deposition of Richard H. Allen) opposite to it and following the word 'buyer' the name of the buyer; but the words around or about the word "seller," in each of said nineteen "slip contracts," were written therein by me afterwards, not as a

part of the contract, but as a memoranda from which the book-keeper of R. H. Allen & Co., could make the proper entries on the books." Record, page 19. So, this contract did not have the name of the seller at all: It, in substance, declares that Zerega & White had bought twenty-five hundred bales of cotton, but it does not say from whom they bought. Every one of said nineteen 'slip contracts' were in the same form—that is, they contained the name of the buyer, but did not contain the name of the seller.

These contracts were made in New York, and were void under the Statute of Frauds of New York, which was read in evidence by the defendant Bibb, and is copied in the bill of exceptions. Record, page 23.

That statute is as follows: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars, or more, shall be void, unless—

"First—A note or memorandum of such contracts be made in writing, and be subscribed by the parties to be charged thereby; or,

"Second—Unless the buyer shall accept and receive parts of such goods, or evidences, or some of them of such things in action; or,

"Third—Unless the buver shall at the time pay some part of the purchase money."

It is distinctly proved by Harry Allen, witness for the plaintiffs, "that when plaintiffs sold cotton for B. S. Bibb & Co., in November, 1886, no part of said cotton was delivered, nor was any part of the purchase money paid. Record page 19.

This New York Statute has been construed by the New York Courts. In the case of Wright vs. Weeks, 25 New York (11 Smith) on page 161 the court of appeals says:

"It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it. It was decided as early as 1804, in Wain vs. Warlters,

5 East., 10, that a writing cannot be a memorandum of an agreement, unless it contain the whole agreement, that is to say, the parties and the consideration and the subject matter, as well as the promise; and this is now well settled law."

"Unless the essential term of the sale can be ascertained from the writing itself, or by reference in something else the writing is not a compliance with the statute; and, if the agreement be thus defective it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent." 95 U. S., 456 and the cases there cited.

To avoid the effect of the Statute of Frauds and of the rules of interpretation thereof, before stated, the plaintiffs, in the trial court asked their witness, Harry Allen, this question: "When these 'slip contracts,' read in evidence, were delivered, did your firm deliver to the buyers a corresponding contract of sale?"

Thereupon the defendant Bibb objected to that question, and stated the following grounds of objection thereto:

1st "Because the question called for parol evidence of the contents of a written contract, without accounting for the absence of the writing.

2nd. Because the question called for secondary evidence.

3rd. Because the question sought to connect the said 'slip contracts,' read in evidence, with other contracts not referred to in said 'slip contracts.'"

But the court overruled this objection and Bibb then and there excepted, and the witness answered: "When said 'slip contracts,' read in evidence, were delivered to me, I delivered to each buyer, respectively, a corresponding contract of sale." Record, page 15.

In New York it is well settled, not that contracts under the statute of frauds, must be in one writing, but that if in two writings, such writings cannot be connected

together by parol evidence. In Wright vs. Weeks, 25 New York, on page 160, the court says:

"So an agreement need not be perfect in itself. It may be made certain and definite, and thus valid, under the statute, by reference to another writing as well as by incorporating the entire contract in one paper. But the reference must be to another paper, and so distinct as to make that paper a part of the contract itself. (Kenworthy vs. Schofield, 2 Barn. & Cres., 945.) The parties cannot unite two papers, so as to make them unitedly constitute a valid contract, unless they are physically joined, or the intention to unite them appears on the face of the papers. If the connection between two papers depend upon verbal testimony, or if the reference in the written memorandum is to something ver bal, the whole evil intended to be remedied by statute will be experienced." And the following cases are to the same effect:

Carter vs. Shorter, 57 Ala., 253.
Carroll vs. Powell, 48 Ala., 298.
Adams vs. McMillan, 7 Porter (Ala.,) 73.
Browne on the Statute of Frauds, section 348.
Benjamin on Sales, page 240, 4th American edition.

Both parties must be named in the written contract, or described in some way, so as to be identified with certainty. Fry on Specific Performance, page 160, and section 132.

It is apparent from the foregoing authorities that the nineteen 'slip contracts of sale' read in evidence, were void contracts, under the Statute of New York, and that the testimony of Harry Allen, as to the "corresponding slip contracts of purchase," ought not to have been received by the court for two reasons:

1st. Because it was an attempt to unite two papers as one contract, neither of which referred to the other.

2nd. Because it was parol evidence of the contents of the writing—not accounted for.

Fifth—Every principal who employs an agent to make a contract for him has a right that the contract shall be valid and binding, according to the law of the place where the contract is to be performed, and so made that the contract would be enforced by the courts. In the case of Owings vs. Hull, 9 Peters, page 626, this courts says:

"Every authority given to an agent or attorney to transact business for his principal, must, in the absence of any counter proof, be construed to be to transact it according to the laws of the place where it is to be done. A sale of slaves, authorized by an executrix, to be made in Louisiana, must be presumed to be intended to be made in the manner required by the laws of that State to give it validity. And the purchaser, equally with the seller, is bound under such circumstances to know what these laws are, and to be governed thereby."

Sawyer vs. Mayhew, 51 Me., 398-401.

Justice Story, who delivered the opinion in Owings vs. Hull, supra, also states the rule in a different form in his work on agency. He says: "An agent is entitled to his commissions only on a due and faithful performance of all the duties of his agency, in regard to his principal."

Story on Agency, Sections 331-333.

"The same rule applies to advancements, disbursements and expenses."

Story on Agency, Section 336.

"And special agents are bound to the diligence of good business men in his specialty."

Wharton's Law of Negligence, Sections 527-531.

So, in this case, Allen & Co. having been employed by Bibb to sell cotton for him, in the New York Cotton Exchange, was bound to sell the cotton by a legal contract, binding on both parties. This, as we have seen, they failed to do, but on the contrary, made contracts, nineteen in number, in such form that they were void under the Statute of Frauds of the State of New York.

According to the testimony of one of the plaintiffs, Harry Allen, the "slip contracts of purchase" had no seller's name in it, and the "slip contracts of sale" had no buyer's name in it. This was not only contrary to the Statute of Frauds of the State of New York, but is directly contrary to the form prescribed for such contracts by the rules of the New York Cotton Exchange; Record, 102 where a form for such contract is given, which form was evidently prepared by a New York lawyer, under the Statute of Frauds of that State.

Sixth.—Bibb had no knowledge or information as to the form of the contracts by which Allen & Co. sold cotton for him until after the suit was commenced. Testimony of Harry Allen. Record, 19.

The court will notice that this is an action of assumpsit, for services rendered and money paid. In such actions no recovery can be had, unless there be a promise on the part of the defendant. We concede that this promise may be either express or implied. Bibb did request Allen & Co. to make contracts of sale for him; and if Allen & Co. had well and faithfully made such contracts, legal in form and binding on both parties, the promise on the part of Bibb would be implied by law to the effect that he would pay Allen & Co. for their services.

So, too, if Allen & Co. had made these sales for Bibb in due and legal form, so as to be binding on Allen & Co., and on the purchaser also, and Allen & Co. paid the losses for Bibb, the law would have implied a promise on the part of Bibb to pay Allen & Co. the money which they had paid for Bibb; but we have shown that these contracts of sale were void under the Statutes of New York, and that Allen & Co. were not bound by such contracts to pay money for Bibb. This being so, if they paid the money it was without any actual request on the part of Bibb, and it was also without any implied promise on his part to repay the money to them.

The Complaint in this case (as it is called in Alabama) avers that the money sued for was paid out and expended by the plaintiffs for the defendants, and at their special instance and request; and this is substantially in the form required by our Code.

Speaking of this action for "money paid," Mr. Chitty says: "It is also necessary, secondly, that the defendant's express or implied request to the plaintiff to pay the money for his use should be shown by the plaintiff." Chitty on Contracts, 592. Mr. Chitty, in the same volume, on page 594, says: "But there are instances in which the defendant did not (in fact) request the plaintiff to make the payment for him, yet the law will imply such request and admit no evidence to the contrary. Thus, while the plaintiff is compelled to make a payment of the defendant's legal debt, in consequence of his neglect or omission to discharge it; the law infers that the defendant requested the plaintiff to make the payment for him, and gives the action for money paid. As if the plaintiff paid rent due from the defendant in consequence of the plaintiff's goods being duly distrained for such rent."

"Where a person becomes surety for another, at his request, the law implies the promise by the latter that he will indemnify the surety and pay him whatever he may be compelled to pay the creditor."

Chitty on Contracts, page 597.

"But where the plaintiff, by the defendant's authority and in his name paid illegal bets on horses, and the bets having been lost, the plaintiff paid them *without the defendant's subsequent orders,* it was held that he could not recover the money so paid."

Chitty on Contracts, 599–600.

Of course, if a surety, legally bound by a contract with his principal, pays the money, he can recover it of his principal as money paid, but there must be a legal obligation on the surety, to pay the money, or a special request to pay it. In this case Allen & Co. were not

legally bound to pay the losses, and there was no request made by Bibb, that they should pay the losses; and this defense could be well made under Bibb's first, second or third pleas, as well as under his sixth plea, setting up the Statute of Frauds.

VARIANCE.

Seventh.—The suit is against "B. S. Bibb and Thomas H. Hopkins, who are partners doing business together, as such, under the firm name and style of B. S. Bibb & Co.," and seeks to recover of that firm, for services rendered and money paid out, by the plaintiffs, for the defendants, at their special instance and request.

So the suit is against the partners as such, and the contract described in the complaint, is a contract made by both defendants as partners. The defendants plead separately, and the jury found their verdict "for the defendant, T. H. Hopkins, on the ground that we find he was not a partner of B. S. Bibb." So that it is conclusively established by the verdict that there was no contract made by the partnership as alleged in the complaint. A verdict and judgment was rendered against Bibb, which must have been on a contract not stated in the complaint. In other words, the plaintiff sued on one contract and recovered on another and a different contract. The complaint is in the Alabama Code form.

31 Ala 351

In Walker vs. the Mobile Marine Dock and Mutual Insurance Co., the Alabama Supreme Court construed the form used in this case, and the effect of a variance in using such form under the Alabama Code. In that case the court says:

"Section 2156 of the Code says, that when a suit is instituted against several defendants, whether sued as partners or otherwise, the plaintiff may recover against one or more, but is liable for the cost to those against whom he does not recover. This statute cannot mean that a recovery can be had upon a contract, described in

the complaint as made by two or more, when the proof shows that it was made by a less number. To so construe the statute, would authorize a recovery upon a cause of action not embraced in the pleading, and would virtually abrogate so much of section 2227 as requires the presentation of the facts, or matter to be put in issue under an intelligible form. The statute is not designed to create a right of recovery inconsistent with the complaint; but to authorize a judgment, where some of the defendants are discharged upon the grounds which do not show the absence of a right of recovery against the remaining defendants upon the pleading. The statute embraces all those cases where the plaintiff fails to recover against a part of the defendants, upon the plea of infancy, coverture, bankruptcy, or any other ground, which does not show that the cause of action is variant from the complaint. The appellant in this case might with propriety, have asked the charge to the jury, that the plaintiff could not recover, unless the contract was made by all the defendants. But they did not ask this or any other charge. They suffered judgment to be rendered against them without an objection; and we think it is now too late for them to raise the question. Our law declares that no judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action. Code section 2405. The appellants made no objection to the return of a verdict against them alone, or to the rendition of a judgment against them alone."

The code referred to is the Alabama Code of 1852, but is the same in all respects, on the matters involved, as our present Code. In that case cited from 31 Alabama there was no bill of exceptions at all. The question of variance between the contract declared on and the evidence was in no way objected to, and in no way saved by bill of exceptions in the trial court. Here the question was saved and reserved for the consideration of

this court in two distinct forms. The court charged the jury of its own motion, in these words:

"This case is made out as to the defendant Bibb, and it is your duty to find a verdict against him for the account sued on, and interest." And the defendant Bibb excepted to this charge, thus raising directly the question of variance between the contract sued on, and the contract mentioned in the proof. The court ordered a verdict to be found against Bibb. After that charge was given and excepted to, Bibb could raise no possible point by asking a charge himself.

And Bibb did attempt after the verdict, to reserve that same question, by objecting to a judgment being rendered against him on the ground that "the complaint and pleadings, and the verdict did not authorize a judgment against the defendant Bibb." Record, page 24.

Eighth—The trial court refused to exclude the statement of the witness, Harry Allen, which was in these words: "And I am sure that these losses were paid by R. H. Allen & Co." Record, 19.

When considered with the context this is merely an opinion given by the witness, and not the statement of a fact.

Ninth—The books of the plaintiff were not admissable evidence against Bibb, yet the trial court permitted Harry Allen to give secondary evidence of the contents of these books; or rather to state his conclusion, as to what these books "showed" against the objection of Bibb. Record, 20.

Tenth—The court permitted the plaintiffs to read the deposition of Richard H. Allen, illegally taken; as is hereinbefore proven. Record, 20.

Eleventh—The court erred in charging the jury as follows: "This case is made out as to defendant B. S. Bibb, and it is your duty to find a verdict against him, for the account sued on and interest." Record, 24.

1. This charge violates the law, in this—it ordered the jury to return a verdict for plaintiffs, although the

plaintiffs failed to prove the contract averred in the complaint. The plaintiffs sued on one contract, and this charge orders a verdict, in their favor, on another and a different contract.

2. This charge also violates the law in that it assumes, as proved, that the plaintiffs paid losses, on the November contracts of sale, *at the request of defendants;* whilst the evidence shows that these November contracts of sale were illegal contracts, not binding on Allen & Co., never authorized by Bibb, and that in paying these losses, *if they did pay them*, Allen & Co. did so voluntarily; and Bibb made no express request to have these losses paid, and under the facts no such request can be implied.

3. And this charge assumes that Allen & Co., as agents for Bibb, employed to make the contracts, performed that duty faithfully and according to law, and were therefore entitled pay for their services. Whereas, Allen & Co. did the work so negligently, that the contracts made by them were void.

4. This account, for which the jury were ordered to find against Bibb, depended mainly for its support, on the testimony of Harry Allen and Richard H. Allen, two of the plaintiffs. Their testimony set aside and there is nothing to prove that plaintiff performed services for Bibb, or paid money for Bibb.

And we submit to this court, that neither of these witnesses stood so well before the jury, as to be above criticism.

Harry Allen, apart from his bias as plaintiff, testified positively to matters which he did not know.

(a) He testified, that the account read in evidence "*was correct.*" 17

(b) "The contracts made by Richard H. Allen & Co. for B. S. Bibb & Co., were closed on the 30th day of December, 1886, by buying to cover." 18.

(c) "And that losses on these contracts, amounted in the aggregate to $19,273.50, and were paid by Richard H. Allen & Co. on the 30th of December, 1886." 18.

(d) "But I know that said contracts were closed on December 30th, 1886, by contracts to cover." 19.

(e) "But I know it was paid." 19

Yet Harry Allen was not in New York on December 30th, 1886, for he was then in Memphis, Tenn., where he remained a week or ten days. 18 and 19. And on cross examination it is shown that he did not know in what the money was paid, or to whom, or in what amounts, or whether in checks or money. Record, 19. The said Harry Allen also stated: "I did testify on a former trial of this case, that I did not know of my own personal knowledge, who paid the losses on the contracts of sale for Bibb & Co. made by Allen & Co.

Surely the testimony of a man who thus swears recklessly to matters which he cannot possibly know to be true, ought not to be accepted by courts as absolute verities, but should be submitted to the jury to be considered and weighed by them.

GEORGE H. CRAIG,

E. W. PETTUS,

Attorneys for Plaintiff in Error.

CRAIG & CRAIG & PETTUS, of Counsel.

149 U.S. 481

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Record Case 13,888.

Supreme Court of the United States

October Term, 1892.

BENAJAH S. BIBB, *Plaintiff in Error,*

vs.

RICHARD H. ALLEN & CO.

From the Circuit Court of the United States for the Middle District of Alabama, by Writ of Error.

BRIEF FOR RICHARD H. ALLEN & CO.,

— BY —

A. A. WILEY, Attorney.

BROWN PRINTING CO. Montgomery, Ala.

Supreme Court of the United States.

October Term, 1892.

Record Case 13,888.

BENAJAH S. BIBB, *Plaintiff in Error,*

vs.

THOMAS H. ALLEN, THOMAS H. ALLEN, JR., RICHARD H. ALLEN AND HARRY ALLEN, PARTNERS UNDER THE FIRM NAME AND STYLE OF RICHARD H. ALLEN & CO.

From the Circuit Court of the United States for the Middle District of Alabama, by Writ of Error.

Come Thos. H. Allen & Co., a partnership composed as aforesaid, and say that in the record and proceedings of the court below there is no error.

ARGUMENT OF A. A. WILEY,

In behalf of Richard H. Allen & Co.

This case involves the legality of contracts and the purchase and sale of cotton for future delivery, conducted under the rules of the Cotton Exchange of New York city, and the right of brokers, who act as agents in effecting such transactions, to recover from the defendant, their principal, commissions for their services

and losses paid by them in the execution of his mandate, for and on account of said principal.

The New York Cotton Exchange is a corporation chartered in accordance with the laws of the State of New York. Amongst its purposes, as declared in its charter, are the following:

"Sec. 3. The purposes of said corporation shall be to provide, regulate and maintain a suitable building, room or rooms, for a Cotton Exchange in the city of New York, to adjust controversies between its members, to establish just and equitable principles in the trade, to maintain uniformity in its rules, regulations and usages, to adopt standards of classification, to acquire, preserve and disseminate useful information connected with the cotton interest throughout all markets, to decrease the local risks attendant upon the business, and generally to promote the cotton trade of the city of New York, increase its amount and augment the facilities with which it may be conducted. The said corporation shall have power to make all proper and needful by-laws, not contrary to the constitution and laws of the State of New York, or of the United States."

(See Transcript, p. 60.)

In the execution of these purposes, the Exchange has adopted an elaborate system of rules governing contracts for the future delivery of cotton.

These rules recognize no contracts except for the sale and purchase of cotton to be actually delivered and received at the future period stipulated. They impose upon the seller the absolute obligation to deliver, and on the buyer the absolute obligation to receive, the cotton, except in certain cases, viz: Where any party holding a contract against another, corresponding in

all respects, except as to price, with one held by the other party against him. may close or cancel both by giving notice in writing to the opposite party at any time before notice of delivery.

These rules are, by their own terms and by the terms of the contracts entered into under them, written into the contracts and form as much part of the agreement of the parties as the stipulated price or quantity of the cotton.

They are published for the information, not only of members but of outsiders, are accessible to all, are referred to in the contracts, and no person dealing thereunder can be allowed to plead ignorance of them.

One of the plaintiffs, Harry Allen, was a member of the New York Cotton Exchange, and the firm of R. H. Allen & Co. did business as brokers in making contracts for future delivery of cotton. They received many orders from defendant, as shown by the evidence, to buy and sell for his account a large number of bales of cotton for future delivery. They executed these orders by entering into contracts, conforming to the rules of the New York Exchange, for the purchase and sale of said cotton for future delivery, in accordance with the said rules, and at the price per pound, as shown by these contracts, which are referred to in the testimony as "slip contracts." Defendant was duly and promptly notified by the plaintiffs of each sale and purchase, and fully ratified the same. Immediately upon the close of each transaction the plaintiffs furnished him with a statement thereof, showing the amount due by him to them on account of his losses and commissions. He never made any objection to any of these accounts, or to any of the contracts of his agents. He repeatedly promised to pay. On November 12th, 1886, he

wired plaintiffs: "Customers all right. No need for uneasiness we assure you." On same day he wired them as follows: "Will send the margin you ask for. No cause for uneasiness."

(See Record, p. 65.)

The witness, R. D. Haslip, as the agent of plaintiffs, went to Selma, Ala., on the 22d day of October, 1886, and there, for the first time, met the defendant Bibb in his office. They had a conversation about the business of buying and selling cotton for future delivery in New York. Haslip told Bibb that he would write to R. H. Allen & Co. in reference to the matter, and that in turn they would write from New York to him, or rather his firm B. S. Bibb & Co.

(See p. 11 of Transcript.)

On the 26th day of October, 1886, plaintiffs did write to defendant, amongst other things, as follows: "Our regular terms are $10.00 per 100 bales, commissions and margins of $2.00 per bale. We shall be pleased to have you write us and state what arrangements you wish to make, and we shall be glad to meet your views, if it be in any way possible for us to do so. If the business be large and made safe we will be the better prepared to meet you," etc.

The defendant answered this letter (see page 56 of Record); and other letters on the subject passed between the parties. It was finally understood and agreed that Shepperson's Code, edition of 1881, should be used in giving orders; that defendant, doing business under the firm name and style of B. S. Bibb & Co., should have the entire business in Selma; that is to say, the plaintiffs would not accept orders in Selma from other parties except through defendant; that the

defendant was to guarantee every order sent and plaintiffs to guarantee all profits earned—each party to pay his own telegrams.

The contract thus entered into between plaintiffs and defendant is certainly valid. It depends upon the state of things existing at this date, and is not affected by any subsequent agreements by which the plaintiffs, as brokers, and the parties with whom they dealt in the Exchange voluntarily assented to settlements on the basis of differences in price. This contract between the plaintiffs and defendant to buy and sell cotton for future delivery imports, upon its face, an absolute obligation on the part of the vendors to deliver, and on the purchaser to receive the cotton sold. So also the "slip contracts" between plaintiffs and third parties in the Exchange. Not a line of evidence, either direct or circumstantial, connects either plaintiffs' or their vendees in the Exchange with any agreement, understanding or intention, express or implied, annulling or impairing these obligations.

TO RECAPITULATE THE FACTS BRIEFLY.

Thos. H. Allen & Co. were cotton factors in the city of New York; as such factors, they were retained and employed by defendant Bibb to buy and sell cotton for him and by his orders for future delivery; they bought and sold cotton for him under the rules of the New York Cotton Exchange; and the account sued on arose out of said transactions in future cotton contracts, and included the losses on such contracts paid by plaintiffs and their commissions; all such cotton contracts were made by them, as factors, in accordance with the rules of the Cotton Exchange in the City of New York; and after said losses were sustained and paid by them, the defendant repeatedly by letters and telegrams promised to repay the same.

ARE THE CONTRACTS WAGERS OR BETS, PROHIBITED BY THE STATUTES OF NEW YORK?

1. One of the defenses is, that the cotton contracts for future delivery are wagering contracts and prohibited by the statute of New York.

It will be observed that the statute of New York declares only wagers, bets or stakes unlawful; and makes all contracts for or on account of any money, or other thing of value, so wagered, bet, or staked, *void*.

It is not necessary, in order to sustain the liability of defendant Bibb upon the contracts in question, for us to controvert the position, that contracts for future delivery, where there is no intention to receive the commodity on the one hand, or to deliver on the other, but an agreement merely to pay the differences in the price thereof, according to the fluctuations of the market, are wagering contracts. All the authorities which go to sustain this principle are cases between the contracting parties, the vendor and the vendee, as shown by the cases of Cassard v. Hinman, 1 Bosw. 207; Brua's Appeal, 55 Pennsylvania St. 294. The present action, as shown by the facts disclosed in the bill of exceptions, is not a case between the contracting parties. The contracting parties were defendant Bibb and certain third persons, with whom the plaintiffs, Allen & Co., made contracts, for him, and on his account. The plaintiffs were the mere factors or agents of defendant; and when they sue their principal for money paid by them, as such agents at his request, as well as for the compensation due to them as such agents, the case presented is not one where the Court is called upon to execute or enforce a contract against the law between the parties to that contract, but it is a case of "a mere agency." See authorities hereafter cited.

In the case of an agency, if the agent conforms to his

instructions, and loss is sustained by the transaction, and paid by the request of his principal, the principal is liable to repay the agent the loss thus paid by him.

Knight v. Chambers, 80 Eng. Com. Law. Rep. 561.
Knight v. Fitch, 80 Ibid. 566.
Roseware v. Billing, 109 Eng. Com. Law. Rep. 316.
Brown v. Speyers, 20 Grattan Rep. 308–9.
Durant v. Burt, 98 Mass. 161, 168.

Especially is it true, where, as in this case, the agents made all the payments of losses, and rendered all their services as agents, under instructions of their principal and without any countermand therefor, and without any notice from him that he intended to make, or even thought of urging, objection to the validity of the transactions which were had at his instance and by his instructions; but, on the contrary, recognizing and ratifying the payments made by his agents.

Durant v. Burt, 98 Mass. 167–8.

This principle is applied with still greater force when, as in this case, the alleged illegal transactions were all past and executed, and their principal had made express promises in the form of letters and telegrams, and orally, to pay them as agents, not only what they had previously paid out at his request, but had earned as compensation.

Armstrong v. Toler, 11 Wheaton, page 274.

In the opinion delivered by Chief Justice Marshall in the case last cited, it is said: "The opinion is, that a new contract, founded on a new consideration, although in relation to property, respecting which there had been unlawful transactions between the parties, is not itself unlawful." The case of Faikney v. Renous, 4 Burr. 2069, was cited with approval. In that case the plaintiff and one Richardson were jointly concerned in certain unlawful contracts; a loss was sustained and paid by the

plaintiff, and the suit was upon a bond, given to secure the payment of Richardson's proportion of the loss. It was held that the plaintiff was entitled to recover. Lord Mansfield gave his opinion on the general ground, that if one person apply to another to pay his debt, (whether contracted on the score of usury, or for any other purpose) he is entitled to recover it back. Chief Justice Marshall says of this case: "This is a strong case to show that a subsequent contract, not stipulating a prohibited act, although for money advanced in satisfaction of an illegal transaction, may be sustained in a court of justice." All the cases cited in Armstrong v. Toler, *supra* and upon the authority of which that decision is based, sustain and illustrate the principle for which we here contend.

See, in addition, Petrie v. Hannay, 3 Term. Rep. 418.

Owen v. Davis, 1 Bailey, 315.

Farmer v. Russell, 1 Bos. and Puller, 296.

But the case now before the court is a much stronger one than Armstrong v. Toler, *supra*, being, as tersely stated in many of the cases above cited, "a case of a mere agency." And here we might rest, and challenge the production of a single case of respectable authority, which holds that an agent cannot recover of his principal losses sustained even on an illegal transaction, which have been paid by the agent, after the transactions were past and executed at the request of the principal.

Miles v. Andrews, 40 Ill. App. 155.

This same principle has been recognized and applied in other than the cases of mere agents.

Partners, who have been engaged in illegal transactions, have been held to account, as between each other, for the profits realized from such transactions.

Brooks v. Martin, 2 Wall. 78.

A new promise made after the late war, to repay money borrowed, while it was in progress, by a resident of the Confederate States from one in the loyal States, may be enforced. There is a sufficient moral obligation to pay to sustain such promise by way of consideration.
Ledoux v. Bookler, 21 La. Ann. 130.

If a principal furnishes his surety money to pay upon a bond, given upon an illegal consideration, and the surety promises to pay it to the obligee in the bond, this is a new contract, and binds the surety.
Booker v. Parker, 23 Ark. 390.

A stakeholder of money, bet upon a race, may recover it in an action against a person with whom he has deposited it, though the wager be illegal and void as between the parties betting.
Perkins v. Clemon, 23 Ark. R. 221.

The bill of exceptions in the present case recites that all the evidence is set out. From this evidence it does not appear that the plaintiffs, Allen & Co., ever advanced any money or put up any margins to enable defendant Bibb to make illegal contracts; but it does appear that the understanding between them was, that plaintiffs would pay the differences and advance necessary sums of money to keep the contract good, according to the rules and regulations of the New York Cotton Exchange. In accordance with this understanding, which was equivalent to a previous request, after losses had been sustained, and no special instructions otherwise given, plaintiffs paid the losses; and afterwards when defendant Bibb was free to act voluntarily, he made express promises in the form of letters and telegrams and orally, to repay the amount thus advanced by them for him to cover the transactions, and also promised to pay them their com-

missions, as agents. Upon the principles decided in all the above cited cases, this must be considered and held to be a new contract, independent of any alleged illegality or taint in the original transactions, founded upon a moral obligation to pay, and a sufficient consideration, as between the parties thereto.

An agent employed to sell property, receive and remit the money, shall not refuse to account, on the plea that the act which brought the money into his hands was in violation of law. And the courts go far to give such a construction to the acts of a principal as will prevent them being heldillegal in such a case.

Anderson & Tilley v. Moncrief, 3 DeSaussure's Equity (So. Ca.) Rep. 124.

In that case the court, after observing the defense to be the alleged illegality of the contract, remarks: "I cannot, however, think that these decisions have any application to this case; this is a mere agency. But, suppose it to be a contract; what is it? That defendant would receive a cargo of negroes, and sell them and receive the money for the complainant. All this he has done; it is completed. It would be monstrous that the defendant should be permitted to keep the money; and the decided cases, following the principles of abstract justice, show that where an illegal transaction has taken place, the agent who has received the money on the part of the principal, shall not shelter himself from the payment of it to his principal under the pretence of the illegality of the original transaction."

If these future cotton contracts had yielded a large profit, it would have been monstrous that Allen & Co. should have been permitted to keep the money and shelter themselves from its payment to Bibb under the pretence of the illegality of the original transactions. When losses occurred and were paid by Allen & Co. and

defendant Bibb subsequently promised to repay them, is not the converse of the proposition true? And is it not monstrous and against the principles of abstract justice, that Bibb should be permitted to shelter himself from payment under the pretence of the illegality of the original transaction?

Tennent v. Elliott, 1 Bos. and Puller 4.

All the decided cases are reconcilable by observing the distinct line of difference; one class being between the contracting parties, in which it was sought to enforce an illegal contract, or a payment of balance on settlement, having no other consideration or foundation than the illegal contract; the other class being those in which an agency or some other fiduciary relation has intervened, attended by a previous request or subsequent promise after the transactions were past and completed. "When once the contract is executed, it is at an end; new rights are at once acquired, not by force of the illegal contract, but by the consent of the parties; and the law will not permit a new game of iniquity to be opened in relation to them."

Our argument thus far has proceeded upon the concession, that such contracts for future delivery of cotton, made in the Exchange, as above mentioned, may have been invalid. This concession was indulged for the purpose of exposing the nakedness of the pretended defense, its utter destitution of merit, either in law or morality, and its entire perversion of the plainest obligations and duties imposed by the law of the land.

The alleged invalidity of such contracts, in this case, is to be determined by the law of New York, the State in which the contracts were made, and were to be performed, and were performed and executed.

Ever since 1802 it has been the settled law of New York that contracts for the future delivery of meal are

valid, even where an option to require or to make a delivery was, by the terms of the contract, secured to one party only.

Disborough v. Neilson and others, 3 Johnson's Cases 81.

Giles v. Bradley, 2 Johnson's Cases, 252.

Frost v. Clarkson, 7 Cowen, 24.

2 Parsons on Contracts, 4th Edition, 170, 171, 179, 180, 184.

Hochster v. DeLatour, 2 Ellis and B. 578; (20 Eng. Law and Equity Rep. 151.)

Murrell v. Whitney, 32 Ala. Rep. 63.

3 Sandf. Rep. 230.

So, too, for the future delivery of gold.

Brown v. Speyers, 20 Grattan's Rep. 296.

So, too, for the future delivery of pork.

McIlvaine v. Egerton, 2 Robertson's (N. Y.) Rep.

Robertson v. Davenport, 27 Ala. R. 574.

So, too, for entering the service of a defendant on a future specified day.

Hochster v. De Latour, *supra.*

Of course, such contracts for the future delivery of cotton are valid, unless some statute of New York exists which makes a distinction between cotton and other chattels, the real subjects of purchase and sale.

No such statute exists, or has ever existed, in New York. True, the defense claims that such contracts are within the statute of New York, relating to wagers, or bets, or stakes. But clearly this is sheer assumption. For, in no just sense, is such a contract a "wager, or bet, or stakes." This is demonstrated by the authorities previously cited, and still more conclusively in Hibblewhite v. McMorine, 5 Meeson and Welsby, 460.

See, also, 1 Chitty on Contracts, 8 American Edition, marginal page 572.

Dykers v. Townsend, 24 New York Rep. 57, which overrules Stebbins v. Leowolf, 5 Cush R. 143.

During the argument of Hibblewhite v. McMorine, *supra*, among many sound legal propositions announced by the Barons, was this: "It cannot be a wager unless both parties are cognizant of the facts; that is not stated here." This proposition is absolutely decisive against the assumption of defendant in the present case, that the contracts made for him by his agents, with third persons, were contrary to the statute of New York, and illegal. No witness in this case even pretends to know or state that these third persons had any "intention" that there should be no delivery, or that they were "cognizant" of such "intention" on the part of Bibb, or his agents. There is not a particle of evidence even tending to show that these third persons, either in "intention" or otherwise, were concerned in any "wager, or bet, or stakes." And, obviously, if these third persons in these contracts made with them by defendant Bibb, through his agents, was not concerned in a "wager, or bet, or stakes," notwithstanding his "intention" to become a gambler, he could not in law be deemed, in these contracts, to be concerned in a "wager, bet, or stakes." His agents cannot, in law, be deemed parties to these contracts, as is clear from Frost v. Clarkson, 7 Cowen, 24, and other authorities. He and these third parties with whom his agents dealt for him were, in law, the only parties to said contracts. And as there is no evidence tending to show any violation of this statute of New York by said third parties, their innocence must operate, in legal contemplation, to acquit him of any violation of that statute, so far as said contracts are concerned, notwithstanding defendant's own zeal to hold himself forth as guilty of the "intention" to violate, and of actual violation of that statute. There must be two parties to a "wager, or bet, or stakes." The mere "intention" of one person and of his agents to enter into a "wager, or bet," or to put up "stakes" with third persons, who are not cognizant of any such intention, and

do not concur in it, cannot constitute a "wager, or bet, or stakes." This was expressly decided in Frost v. Clarkson, *supra.*

The effect of "intention" upon such a contract is entirely misconceived by the defendant, and he has wholly lost sight of the well settled distinction "between the construction of a contract and the correction of a mistake." Amongst other things, one of the best writers upon contracts says:

"The rule is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law, will permit. In other words, courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language or to the rules of law." * * *

"A contract which the parties intended to make, but did not make, cannot be set up in the place of one which they did make, but did not intend to make."

The jurisdiction to correct a mistake belongs to a court of equity, upon a bill filed for that purpose, and is "confined strictly to those cases where different language has been used from that which the parties intended."

2 Pars. on Cont., 4th ed., 7–10.

Sandford v. Howard, 29 Ala. 693.

McBryde v. Wilkinson, 29 Ala. 667.

For intention of the parties, not inducible legitimately from the language or words of their contract, as to the future delivery of chattels, can, as between them, be regarded by a court of law.

The opinions of the Barons in Hibblewhite v. McMoraine, *supra*, overthrow Lord Tenterden's views as expressed in Bryan v. Lewis, 21 Eng. Com. Law Rep. 467,

and in Lorymer v. Smith, 8 Eng. Com. Law Rep. 3. They fully establish the assertion made in Brown v. Speyers, 20 Grattan, 309, that the principle relied on by the defendant in the present case, and from which he strives to deduce the invalidity of the contracts made for him by the plaintiffs as his agents, "certainly has been repudiated by great judges, and is not regarded as law, according to the current of modern authorities."

Mortimer v. McCallan, 6 M. & W. 58.

Irwin v. Williar, 110 U. S. 499.

Chancellor Kent maintained the validity of such contracts. He concurred in the decision in Disborough v. Neilson, 3 Johnson's Cases *supra*. In his Commentaries, 3 vol. 5th ed. 488, note, he says: "It is sufficient that the thing contracted for has a potential existence; and a single hope, or expectation of means, founded on a right in *esse*, may be the object of a sale, as the next case of a fisherman's net, or fruit, or animals not yet in existence." In full accord with him, are Judge Story, and many of the best English and American Jurists.

Robinson v. Mauldin, 11 Ala., 977, and the authorities there cited.

In Hibblewhite v, McMorine, Parke, B, declares: "I cannot see what principle of law is at all effected by a man's being allowed to contract for the sale of goods, of which he has not the possession at the time of the bargain, and has no reasonable expectation of receiving." He shows that Lord Tenterden's view to the contrary, was exhibited first in the form of a *dictum*, and four years later was "doubtless confirmed by the effects of the unfortunate mercantile speculations throughout the country about that time." Here is brought to light the reason why a comparatively few upright and intelligent Judges have sometime countenanced the utterly impracticable and unsound views, upon which one of the defenses is

predicated in the present action. These judges doubtless were gentlemen of a strong emotional development; and could not patiently endure the consequences which a firm application of settled legal principles would bring down upon persons concerned in "unfortunate mercantile speculations;" and, without being conscious of it, have permitted "hard cases to make shipwreck of the law."

Adherence to settled principles of law results in maintaining the validity of such contracts as here brought to view, however disastrous "the effects" may be to the unfortunate speculator. Speculation is not gambling. See Dewey's Contracts for Future Delivery, p. p. 76 to 81 inclusive.

"The law has no preference for one kind of contract over another." 2 Parsons on Cont. 5th ed. 528.

According to the instructions of defendant, the plaintiffs, as his factors or agents, bought from and sold to third persons for him, at divers times, many bales of cotton for future delivery, in strict accordance with the rules of the New York Cotton Exchange, a corporation duly created and organized ander the statute law of New York. The contract prescribed by these rules, and the rules themselves, were well known both to the principal and agents, as well as to the public. Defendant's instructions were given with distinct reference to these rules; his agents understood that they were to buy and sell, and did buy and sell for him according to these rules. They acted upon that understanding; and these rules, a copy of which is set out in the transcript, constituted part and parcel of every contract plaintiffs entered into for defendant. It is to be observed that by these rules an actual delivery is provided for and required in every contract, unless waived in some mode by the subsequent conduct or assent of both parties, or, certainly, unless the party having the option to make or require an actual

delivery fails or declines to exercise it by insisting upon delivery. By these rules, also, ample, explicit and lawful provision is made for ascertaining and adjusting the damages for any failure to deliver without a legal excuse.

It has already been shown that contracts for future delivery, in which the option to make or require delivery is with only one of the parties to the contract, are valid.

Disborough v. Neilson, 3 Johns. Cases, 81, and authorities therein cited.

It seems to us too clear for further argument, that contracts such as are provided for by the rules of the New York Cotton Exchange, and as are proven to have been made by the plaintiffs for defendant are not, in any sense forbidden either by any statute of New York, or by the common law.

McIlvaine v. Egerton, 2 Robertson, 422.
Pixley v. Boynton, 79 Ill, 351.
Logan v. Musick, 81 Ill, 351.
Rountree v. Smith, 108 U. S. 269.
Williams v. Carr, 80 N. C. 297.
59 Iowa, 435; 97 Ind. 191.
Dewey's Contracts for Future Delivery, pages 50 to 51 inclusive; 109 to 110 inclvsive; 170 to 178 inclusive; 181 to 182 inclusive.
Cassard v. Hinman, 1 Bos. 207.
Kinsbury v. Kirwan, 77 N. Y. 612.
Smith v. Bouvier, 70 Penn. St. 325.
Sawyer v. Taggart, 14 Bush. 729.
Fareira v. Gabell, 89 Penn. St. 89.

In order to effect the validity of such contracts, the alleged illegal intent must have been mutual. The in-

tent of one party, not communicated to or concurred in by the other, will not avail.

Grizewood v. Blanc, 11 C. B. 536.
Kingsbury v. Kirwan, 77 N. Y. 612.
Rumsey v. Berry, 65 Me. 570.

The law presumes that the true intention of the parties is that which is expressed upon the face of their contracts, and also that men, in their busines transactions, do not intend to violate the law or to make contracts for the enforcement of which the law refuses a remedy. Hence, when one party charges that a contract is effected with an illegal intent, the burden of proof is upon him to establish the allegation.

Irwin v. Williar, 110 U. S. 499.
Frost v. Clarkson, 7 Cown, 24.
Williams v. Tiedeman, 6 Mo. App. 269.
Dykers v. Townsend, 24 N. Y. 57.

ARE THE CONTRACTS VOID UNDER THE STATUTE OF, FRAUDS OF NEW YORK?

2. Another ground of defense of the plaintiff in error is, that the contracts, referred to in the testimony, as "slip contracts," were void under the Statute of Frauds of New York, upon the ground that these particular contracts each contained the name of the buyer, but not the name of the seller; that is to say, that these "slips" were not "a note or memorandum of such contracts in writing, subscribed by the parties to be charged thereby."

At the time these "slips" were executed by Richard H. Allen & Co. corresponding slip contracts were signed by them and delivered to the parties, to whom said cotton was sold. Both buyer and seller mutually signed contracts. The contracts signed by Richard H. Allen

& Co. being in the possession of the parties to whom they were delivered, could not be, and were not, offered in evidence, but they were, in form and terms, the same as those which were before the court and jury.

These two papers or slips, thus executed at the same time, are to be construed together, and also in the light of the Rules of the New York Cotton Exchage; and, thus construed, there is a sufficient memorandum of the contract to meet the requirements of the statute of frauds.

Peabody v. Speyers, 56 N. Y. Rep. 230.
Beckwith v. Talbot, 95 U. S. R. 289.
Butler v. Thompson, 92 U. S. R. 412.
Moog v. Strang, 69 Ala. 101.
Madden v. Floyd, 69 Ala. 225.

A contract for the sale of goods need only be signed by the party to be charged.

Steele v. Taft, 22 Huns. (N. Y.) R. 453.

The contracts were executed, and the transactions ratified by the defendant in his subsequent letters, telegrams and conversations.

Hankins v. Baker, 46 N. Y. 666.
Justice v. Lang, 52 N. Y. 323.
Newberry v. Wall, 84 N. Y. 576.

Defense of the statute of frands can not be set up against an executed contract.

See Brown's Index-Digest, N. Y. Court of Appeals Rep. p. 407, referring to Tomlinson v. Miller, 3 Trans. App. 250.

3 Brightly's Dig. N. Y. Rep. 1875 to 1884, p. 5143, S. 87.

Organ v. Stewart, 60 N. Y. 413.

The statute of frauds does not prevent the voluntary execution of a contract, within its provisions, by the parties to that contract, nor annul it when so executed.

Sawyer v. Ware, 36 Ala. Rep. 676, re-affirmed in Godden v. Pierson, 42 Ala. R. 374.

It is settled law, that although the statute of frauds when duly pleaded, will prevent or bar the enforcement of a contract within its provisions, when such contract has not been executed but is sued on, yet that statute does not prevent the parties to such contract from executing it; nor does that statute annul the contract when it has been executed by the parties.

Rakes v. Pope, 7 Ala. Rep. 161.

Browne on Stat. of Frauds, pp. 114 and 115.

The court below having sustained a demurrer to the plea of the statute of frauds, there was no error in excluding as evidence the statute of frauds of New York. This evidence was not admissible under the general issue.

Defense of the statute of frauds can not be made under the general issue, but must be specially pleaded.

Petty v. Dill, 53 Ala.

Patterson v, Ware, 10 Ala. p. 444.

The particular contracts relied on were valid.

See Beckwith v. Talbot, 95 U. S. 289.

But irrespective of the question of the statute of frauds and the legality of the contract, which the plaintiff in error seeks to impeach, the plaintiffs, Richard Allen & Co. as brokers or agents of defendant are entitled to recover, under their contract of agency, their commissions, and what they paid for account of defendant. The validity of the contracts between buyers and sellers in the

Cotton Exchange has nothing to do with the defendant's obligation to plaintiff.

Beckwith v. Talbot, 95 U. S. 292.

Durant v. Barthe, 98 Mass. 168.

Lehman v. Strassburger, 2 Woods. 554.

Planters's Bank v. Union Bank, 16 Wall 500.

OUGHT THE DEPOSITION OF THE WITNESS RICHARD H ALLEN TO HAVE BEEN SUPPRESSED?

3. We do not think there is any merit in the motion of the plaintiff in error to suppress the deposition of the witness Richard H. Allen. If there was anything in his contention, a motion to suppress the whole deposition comes too late at the trial where the grounds urged are such as those set out in that motion. The interrogatories were crossed by defendant. "Parties cannot in this way speculate on the chances of a favorable answer, and, if unfavorable, then have the testimony excluded." There was no excuse for a failure to make the motion at an earlier day of the term, so that the deposition could have been retaken, if the motion had been granted in the court below.

"The obvious tendency of such a practice would be to take the parties, who were reposing on such testimony, by surprise."

De Vandal v. Malone, 25 Ala. 278.

Francis v. Ocean Ins, Co. 6 Cowen, 404.

Washington v. Cole, 6 Ala. 214.

Wilkerson v. Moseley, 30 Ala. 572.

DID THE COURT BELOW ERR IN PERMITTING THE WITNESS HARRY ALLEN TO TESTIFY THAT THE ACCOUNT SUED ON WAS CORRECT?

4. The rules of evidence are adopted for practicable purposes and the administration of justice. And although it is laid down in the book, as a general rule, that the

best evidence the nature of the case will admit of is required; yet it is not understood that this rule demands the strongest possible assurance of the matter in question. "The extent to which the rule is to be pushed is governed in some measure by circumstances.

Miner v. Tillotson, 7 Peters, 99.

The ordinary presumption is, in case of partnership, that all the parties have access to the partnership books, and the contents thereof.

U. S. Bank v. Amos Binney, *et al.*, 5 Mason C. C. Rep. 188.

But the proof is positive, in this case, that the witness Harry Allen had access to the books of the partnership and had knowledge also of the correctness of the entries therein.

His testimony, therefore, that the account read in evidence was correct and admissible. The answer was not a mere matter of opinion, but was proof of a fact derived by the witness from the nature of the operations conducted by him and his firm, and from the course of the partnership business, as well as from the character of the particular transactions under consideration, upon which the account was predicated.

See Kellogg v. Krawn, 14 Serg. & R. 137.

Greenl. on Evidence, 488, section 440.

His testimony, together with a copy of accounts as attached to the deposition of Richard H. Allen, were competent evidence to show that the said accounts were correct; and that the items thereof, except the comissions, had been paid by plaintiffs.

Said Richard H. Allen testified (see page 44 of Record) that the money due on these accounts was expended by him for his firm in the regular and ordinary course of business, and was paid to the parties with whom and against whom, they held the contracts which they had made and held for the account of defendant, and was paid for account of defendant and his customers. These advances were made by plaintiffs to settle the contracts, arising out of the said transactions for and on account of defendant. The account of sales of cotton for defendant are attached to his deposition, and reference is made to them. The sums of money

paid out and advanced by plaintiffs were in the regular order of business, according to the testimony of this witness. They were paid to the parties with whom and against whom plaintiffs held the contracts as above stated. He particularly testified: "I made the payments in the regular way, under the rules of the Exchange."

He testified further, as follows: "I have examined the verified statements of the account of B. S. Bibb & Co., with Richard H. Allen & Co., hereto attached. It is a statement of the account of the defendant with the plaintiffs. It represents the losses made by the defendants on the cotton sold by plaintiffs by order and for the account of the defendants. It represents the sums paid, advanced and expended by the plaintiffs for account of said defendants. It is a true and correct statement of the account of the said defendants with the said plaintiffs. The sum total of the same is $20,-023. 50, which sum includes the commissions due the plaintiffs."

These items were properly taken from the books of the partnership. To these facts both the Allens were competent to testify, and the entries themselves were also evidence of these facts, to-wit: the correctness of the accounts and the fact of payment.

McDonald v. Carnes, 90 Ala. 148.

Acklen, v. Hickman, 63 Ala. 498.

Billingslea v. The State, 90 Ala. 323.

Snodgrass v. Coulson, 90 Ala. 348.

Hancock v. Kelly, 81 Ala. 378.

Terry v. Birmingham Bank, 33 Ala. 608.

"There is no matter which involves a combination of facts that is not liable to be called a conclusion." * * * "There seems to be nothing in this point which requires more extensive consideration."

Massey v. Walker, 10 Ala. 290.

The testimony of the witness Harry Allen, to which objection was made, was based upon his knowledge of the circumstances of the transactions in question, and

the course of the partnership business; and the conclusion is reached almost irresistibly that the account sued on was correct.

OUGHT THE AFFIRMATIVE CHARGE TO HAVE BEEN GIVEN IN FAVOR OF THE PLAINTIFFS?

5. Upon the evidence, as disclosed by the record, the court should have instructed the jury to find a verdict against the defendant Bibb. There was no error in giving the affirmative charge in favor of the plaintiffs.

Improvement Co., v Munson, 14 Wall. 448.

Pleasants v. Fant, 22 Wall. 120.

C. R. R. & Banking Co. v. Letcher, 69 Ala. 106.

R. R. Co. v. Jones, 95 U. S. 439.

Finlayson v. The Chicago, Burlington & Quincy R. R. Co., 1 Dillon, page 579.

Pollak v. Brush Electric Asso. of St. Louis, 128 U. S. 456.

Goodlet v. L. & N. R. R. Co., 122 U. S. 391.

Wilds v. Hudson River R. R. Co., 24 N. Y. 430.

Lake Shore & Mich. So. R. R. Co., v. Miller, 25 Mich. 274.

Pheonix Ins. Co., v. Doster, 106 U. S. 32.

Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478.

Anderson County v. Beal, 113 U. S. 227.

U. S. v. Nine Packages of Linen, Payne C. C. R. 129.

Respectfully submitted.

A. A. WILEY.

Attorney for Richard H. Allen & Co.

Transcripts
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